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NO. 72-299

IN THE

Supreme Court of the United States

October Term, 1972

PILGRIM EQUIPMENT COMPANY OF HOUSTON,
Petitioner

v.

THE STATE OF TEXAS, ET AL,
Respondent

PETITION FOR WRIT OF CERTIORARI
To the Court of Civil Appeals, Houston,
1st Supreme Judicial District of Texas

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Corrections -- third line page 14 should read: ...moved into new plant), totalled $26,455.00, as testified to by Guy Robertson, President of Pilgrim.

-- fourth line page 31 under Conclusion and Prayer should read: ...of said condemnation and are damages that the petitioner...

INDEX

	Page
Opinions Below	2
Statement of Jurisdiction	2
Questions Presented for Review	3
Applicable Law	4
Statement of Case	7
Argument and Authorities	18
Conclusion and Prayer	31
Appendix A:	
Order of Supreme Court of Texas Overruling Petitioner's Application for Writ of Error to the Court of Civil Appeals for the First Supreme Judicial District of Texas, April 26, 1972	A1
Order of Supreme Court of Texas Overruling Petitioner's Motion for Rehearing of Application for Writ of Error, May 24, 1972	A1
Opinion of Court of Civil Appeals, Houston, First Supreme Judicial District of Texas, November 4, 1971	A3

INDEX OF AUTHORITIES

CASES

	Page
Caleb J. Bowers v. Fulton County, Jan. 7, 1966, 146 S.E.2d 884, reh. den., Feb. 2, 1966. Supreme Court of Georgia..	26
City of Houston v. E. Huber, 311 S.W.2d 488, Civ. App. of Texas	28
City of Houston v. Lee M. Fox, 429 S.W.2d 201, Civ. App., Houston (1st District)	19
City of LaGrange v. Pieratt, et ux, 175 S.W.2d 243, Sup. Ct. of Texas	22
City of San Antonio, et al v. The Congregation of the Sisters of Charity of the Incarnate Word, Inc., 404 S.W.2d 333 (Tex. Civ. App., Eastland, 1966)	25
City of Teague v. Stiles, 263 S.W.2d 623, Civ. App., Waco	28
Fitzgerald v. City of Dallas, Civ. App., 34 S.W.2d 682, err. ref.	28
Harris County v. Gerhart, 283 S.W. 139, Supreme Court of Texas	23
Hart Bros. v. Dallas County, 279 S.W. 111, Com. of App. Tex. Sec. B, February 10, 1926	21

CASES

	Page
Magnolia Pipe Line Company v. City of Tyler, 348 S.W.2d 537 (Texarkana)	20
Northern Natural Gas Company v. Claude Johnson, et al, 278 S.W.2d 410, Civ. App. Amarillo, 1954 (reh. den. 1955)	21
State v. Waco Independent School District, 364 S.W.2d 263 (writ ref., n.r.e.)	25
State of Texas v. Honorable Ernest A. King, Judge of the County Court of Ward County, et al, 437 S.W.2d 420, Civ. App., El Paso, 1969	28
United States v. General Motors Corp., 65 S.Ct. 357, 323 U.S. 373	30

TABLE OF STATUTES

Constitution of the United States	
Amendment V	4
Amendment XIV	5
Constitution of the State of Texas	
Art. 1, Sec. 17	5
Vernon's Annotated Texas Statutes	
Art. 3265	5-7
Art. 6674n-4 (now 3266-b)	27
Texas Rules of Civil Procedure	
Rule 1	30
Rule 321	30

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THE STATE OF TEXAS, ET AL,
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PETITION FOR WRIT OF CERTIORARI
To the Court of Civil Appeals, Houston,
1st Supreme Judicial District of Texas

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Pilgrim Equipment Company of Houston, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Court of Civil Appeals, Houston, 1st Supreme Judicial District of Texas, entered in the above entitled case on November 4, 1971.

Opinions Below

The Opinion of the Court of Civil Appeals, Houston, 1st Supreme Judicial District of Texas, is unreported and is printed in Appendix "A" hereto, infra, page A3. The Orders made by the Supreme Court of Texas with respect to Petitioner's Application for Writ of Error to the Court of Civil Appeals and Motion for Rehearing are printed in Appendix "A" hereto, infra, page A1.

Statement of Jurisdiction

The Supreme Court of Texas refused Petitioner's Application for Writ of Error to the Court of Civil Appeals, Houston, 1st Supreme Judicial District of Texas, in the case of Pilgrim Equipment Company of Houston v. State, et al, Cause No. B-3135, as presenting no reversible error on April 26, 1972. A timely motion for rehearing in the aforesaid case was filed in the Supreme Court of Texas on May 11, 1972, and by Order of the Court was overruled on May 24, 1972.

The Supreme Court of the United States has appellate jurisdiction to review a final judgment or decree rendered by the highest Court of a state in which a decision could be had by virtue of 28 U.S.C.A. Section 1257(3), which provides, to wit:

> "By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commissions held or authority exercised under the United States."

Questions Presented for Review

QUESTION 1: Did the Court of Civil Appeals err in holding that "the question of adequate compensation was submitted to the jury" as required by 28 U.S.C.A. Const. Amend. V, and 28 U.S.C.A. Const. Amend. XIV, Section 1?

QUESTION 2: Did the Court of Civil Appeals err by not reversing and remanding the judgment of the trial court on account of the error committed by said court in refusing to allow the introduction of evidence by the defendant (Petitioner) as to moving costs, such costs being a necessary item of damage in a judgment rendering "just" or "adequate" compensation to a land owner as a result of a partial taking for public use through eminent domain, as required by 28 U.S.C.A. Const. Amend. V?

QUESTION 3: Did the Court of Civil Appeals err by not reversing and remanding the judgment of the trial court on account of the error committed by said court in refusing to allow the introduction of evidence by the defendant (Petitioner) as to cost of re-adapting the remainder after the taking, such cost being a necessary item of damage in a judgment rendering "just" or "adequate" compensation to a landowner as a result of a partial taking for public use through eminent domain, as required by 28 U.S.C.A. Const. Amend. V?

QUESTION 4: Did the Court of Civil Appeals err in holding "that the trial court did not err in refusing to allow recovery as separate items of damage, the loss of profit sustained by Petitioner's business and the moving costs and costs of re-adapting the remainder incurred by Pe-

titioner as a result of the condemnation of a portion of its property?

QUESTION 5: Did the Court of Civil Appeals err in holding that Points 4, 5 and 6 in Appellant's brief wherein Appellant contended that it should recover its moving costs and costs of re-adapting the remainder of its property for continued use thereof as a laundry and dry cleaning plant and also its loss of profits, all caused by a partial taking of its property by Appellees through condemnation, were points which were not specially presented to the trial court by the motion for new trial, and this court is not authorized to consider them?

Applicable Law

Petitioner would now show that the Federal questions upon which it bases its right to invoke the jurisdiction of this Court originates and is shown from a proper reading and interpretation of the following Constitutional provisions, amendments, and state statutes.

1: 28 U.S.C.A. Const. Amend. V, provides, to wit:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to bear witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

2: 28 U.S.C.A. Const. Amend. XIV, Section 1, provides, to wit:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizenship of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3: Vernon's Ann. Tex. Const. Art. 1, Sec. 17, which provides:

> "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the state, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but all privileges and franchises granted by the legislature, or created under its authority shall be subject to the control thereof."

4: Vernon's Ann. Civ. St. Art. 3265, which provides:

> "Section 1. The Commissioners shall hear evidence as to the value of the property sought to be condemned and as to the damages which will be sustained by the owner, if any, by reason of such condemnation and as to the benefits that will result to the remainder of such property belonging to such owner, if any, by reason of the condemnation of the property, and its employment for the purpose for which it is to be condemned, and according to this

rule shall assess the actual damages that will accrue to the owner by such condemnation.

Section 2. When the whole of a tract or parcel of a person's real estate is condemned, the damage to which he shall be entitled shall be the market value of the property in the market where it is located at the time of the hearing.

Section 3: When only a portion of a tract or parcel of a person's real estate is condemned, the Commissioners shall estimate the injuries sustained and the benefits received thereby by the owner; whether the remaining portion is increased or diminished in value by reason of such condemnation, and the extent of such increase or diminution and shall assess the damages accordingly.

Section 4. In estimating either the injuries or benefits, as provided in the preceding article, such injuries or benefits which the owner sustains or receives in common with the community generally and which are not peculiar to him and connected with his ownership, use and enjoyment, of the particular parcel of land, shall not be considered by the Commissioners in making their estimate.

Section 5. When the Commissioners have assessed the damages, they shall reduce their decision to writing, stating therein the amount of damages due the owner, if any be found to be due, and shall date and sign such decision and file it together with all other papers connected with the case promptly with the County Judge.

Section 6. Where a Plaintiff, after appeal from an award, or after said proceeding has become a case for trial and court, desires to dismiss, abandon the proceedings, or refuse the jury verdict returned by the jury or by a court prior to entry of judgment. said Plaintiff shall by motion be heard thereon. and

the court hearing the same may as part of the terms of granting such motion, make an allowance to the landowner for reimbursement of his reasonable attorney's and appraiser's fees, shown to have been incurred and, reimbursed for all necessary expenses incurred by the filing and hearing of such condemnation case to date of such hearing on said motion; provided, however, Plaintiff shall not be liable for any such fees or expenses in any case which may be dismissed upon its motion where such case is subsequently refiled, and where the Court is advised by a Plaintiff in connection with any such motion that it intends to refile such case, a reasonable time for such refiling shall be allowed, all orders entered hereunder are appealable.

Section 7. The owner of the land who is actually and physically displaced and permanently moves from his dwelling or place of business shall be entitled to, as a separate item of damages, the reasonable moving expenses for personal property other than machinery, equipment, or fixtures, not to exceed $500.00, when personal property is moved from a place of residence and not to exceed $5,000.00, when personal property is moved from a place of business, but the maximum distance of movement to be considered shall be fifty miles. In no event shall such expenses exceed the market value of such personal property; provided, however, that the provisions of this section shall not apply in any condemnation proceeding whether before special commissioners or the court where the owner is entitled to reimbursement for moving expenses under other existing laws."

Statement of Case

This is a case filed by the State of Texas in the County of Harris on February 25, 1969, in the County Civil

Court at Law No. 1 of Harris County, Texas, to condemn through the right of emient domain 4,918 square feet of Tract 1 referred to herein as condemnation Tract 311 together with the improvements thereon which consisted of approximately one-third of the first floor of the building on said Tract 1, leaving a remainder of 8,268 square feet of land and about two-thirds of the first floor of the building and the entire second floor of said building, and also condemned 3,229 square feet of Tract 2 together with the improvements thereon consisting of one-third of the corrugated iron building known as condemnation Tract 335, leaving as a remainder 6,258 square feet and two-thirds of said building. The actual date of taking by the Respondents as condemnors was June 10, 1969. This property was acquired for state highway purposes and became an integral part of the state highway system of the State of Texas, known as Southwest Freeway or U. S. Highway 59. The project was largely financed by Federal Highway Trust Funds.

The condemnation cut diagonally across both of the tracts of land owned by the Petitioners, slicing off the southerly portion thereof; that part of the property condemned, known as condemnation Tract 311, included the boiler room consisting of the boiler and water softener equipment which served and serviced the entire plant and the downstairs office and a large area in which was located and operated certain pressers, ironers, and other machinery and equipment. In fact, the northerly line of said condemned tract ran directly through and across different machinery and equipment including a huge six-roll ironer which weighed several tons and cut through ducts, steam lines, water lines, high-powered electrical conduits and included the air cooling machinery and

equipment located on the roof of that portion of the building actually condemned, and without which equipment the remainder of the plant could not operate. That on account of said condemnation, it was necessary for Pilgrim to sever the steam and hot water lines and air cooling conduits and high powered electrical lines and make several other costly repairs such as rebuilding a downstairs office and re-routing the plant conveyor system. It was also necessary for Pilgrim to relocate its machinery and equipment repair and parts department and motor repair maintenance and parts department and cabinet, fixtures and carpenter shop. On account of said condemnation, it was necessary for Pilgrim to go to considerable expense buying and installing a new boiler and water softener and readapting, reconstructing and re-equipping the remainder of its property in order to be able to continue the operation of its laundry business although on a much smaller scale and certain important and profitable services had to be discontinued.

The Judge of said court appointed three special commissioners and they had a hearing on March 27, 1969, and signed an award which was filed with the Judge of said court on April 24, 1969.

On May 9, 1969, the Defendant, Petitioner herein, Pilgrim Equipment Company of Houston, and Southland Life Insurance Company (lien holder) two of the defendants, filed objections and exceptions to the award of the commissioners.

On June 10, 1969, there was deposited into the registry of the Court the amount of the award of the special commissioners. Your Petitioner, in turn, withdrew the amount deposited by appropriate application and orders.

Plaintiff filed a Motion in Limine moving the Court to instruct the attorney for Defendant in advance of trial not to attempt to introduce evidence as to the cost of moving, relocation payments, and/or other expenses incidental thereto incurred or to be incurred by Defendants by reason of the condemnation of a portion of their property. Pursuant to this Motion in Limine, the trial court refused to admit any testimony or evidence relative to the readapting expenses incurred by your Petitioner in efforts to continue its business on the remainder of the tracts taken, and other moving expenses. Pilgrim Equipment Company of Houston continued to operate its dry cleaning and laundry business on the remainder for some four months after this taking, but soon found it economically infeasible to continue. Thus, it was necessary for Pilgrim Equipment Company of Houston to relocate its entire plant.

When your Petitioner started to introduce evidence as to the cost of moving machinery and equipment from the part taken to the remainder and from the remainder to the new plant, the attorney for the condemnors objected on the grounds that evidence relating to moving costs was inadmissible as it had nothing whatsoever to do with evaluation of real estate in this condemnation action as to the part taken and/or the remainder of the property, which objection was sustained by the Court (S.F. page 122). At this point, the Petitioner made a Bill of Exceptions in which Guy Robertson, President of Petitioner, testified as to various items of moving costs, both from the part taken to the remainder and, later, from the remainder to the new location, and also as to the over-all cost of purchasing and installing a new boiler and water softener and other machinery and equipment in the re-

mainder and other costs of reconstruction and repairs so as to readapt the remainder in order for it to continue to be used as a laundry and dry cleaning plant, although on a much smaller scale and with considerably less services (S.F. pp. 123-154). A renewed objection to the introduction of this evidence was sustained by the Court (S.F. p. 153).

In the Bill of Exceptions concerning moving costs and costs of readapting the remainder of Petitioner's property, Guy Robertson testified that the cost of moving machinery, equipment, etc., from the part taken to the remainder was $5,457.28 (S.F. p. 124). That the cost of constructing a new superintendent's office in the downstairs remainder to take the place of the superintendent's office which was taken in the condemnation was $3,565.41 (S.F. pp. 138-139). That the cost of loading and moving the maintenance department from the part of the property taken to the new plant on Stella Link was $550.00 (S.F. p. 126) and the cost of reinstalling of machinery in the new plant was $1,250.00 (S.F. pp. 126-127). That the cost of moving the maintenance shop and parts department from the part taken to the Stella Link location was $3,750.00 (S.F. pp. 127, 129). He testified that Pilgrim purchased a new boiler and a new two-roll ironer for flat work but did not state the price (S.F. p. 140). He also testified that the cost of moving office furniture, adding machines, etc. from the remainder on Almeda to the new location on Stella Link was $2,947.73 (S.F. p. 141), all of which aggregated something over $17,000.00.

The trial court's refusal to admit this evidence offered by Petitioner on moving expenses and costs of readapting the remainder was specifically presented to it in our

Amended Motion for New Trial, Assignments of Error Nos. 2, 3, 5 and 13.[1] Such amended Motion for New Trial was denied and overruled by the Court.

In the Court of Civil Appeals, Houston, 1st Supreme Judicial District of Texas, such assignments of Error 2, 3, 5 and 13, as contained in our Amended Motion for New Trial, were further tendered to that Appellate

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1. *Second*—The Court erred in its ruling on the Motion in Limine filed by Plaintiffs herein, particularly by limiting and qualifying the evidence that the Defendants could introduce concerning moving cost and cost of readapting the remainder of their property for use as a laundry and cleaning establishment and loss of profits in the operation of their business as a result of and on account of the condemnation of a part of their property which is described in Plaintiffs' pleadings filed herein.

Third—The Court erred in refusing to admit and/or qualifying and commending upon the evidence introduced or to be introduced by the Defendants at the trial of this cause regarding moving cost, loss of profits, cost of adapting remainder of their property for use previously made thereof and other expenses suffered and sustained by the Defendants on account of the condemnation of their property hereunder, same being in violation of Amendment V of the Constitution of the United States and Article 1, Section 17 of the Constitution of the State of Texas, since such items represented actual damages sustained by the Defendants on account of the condemnation of their property and represented just compensation to which they were legally entitled.

Fifth—The Court erred in refusing to submit to the Jury the Special Issues which were duly and timely presented to the Court by the Defendants concerning moving cost suffered by the Defendants and also the cost of adapting the remainder of Defendants' property so that they could continue to operate a laundry and cleaning establishment thereon and also the loss of profits sustained by said Defendants on account of such partial taking, which under the preponderance, if not all of the evidence introduced, showed that due to such partial taking the Defendants had to relocate their business at substantial cost, expense and damages.

Thirteenth—The Court erred in signing and entering the Judgment for Plaintiffs herein, same being in violation of Amendment V of the Constitution of the United States and of Article 1, Section 17 of the Constitution of the State of Texas.

Court through Point of Error I, IV, and VI, as set out in the Brief of Appellant filed therein and made a part of this Petition for Writ of Certiorari. All points were overruled by said Court as evidenced by the Opinion of the Court of Civil Appeals, Houston, 1st Supreme Judicial District of Texas, which is set out in Appendix "A".

Further, your Petitioner would submit to this Court that the Federal question of "just compensation" for private property taken for public use was presented to the Supreme Court of Texas for due consideration in Points of Error 1-11, as set out in our Application for Writ of Error filed in the Supreme Court of Texas. Such Points of Error were assigned to show error by the Court of Civil Appeals in not reversing the trial court's judgment because of its failure to allow the introduction of any evidence on the cost of moving from the part taken to the remainder and to the new plant, and the cost of re-adapting the remainder. Our Application for Writ of Error addressed to the Supreme Court of Texas was refused, no reversible error, on April 26, 1972. A timely Motion for Rehearing was filed in the Supreme Court of Texas on May 11, 1972, and overruled by the Court on May 24, 1972.

The loss of profits to Pilgrim Equipment Company of Houston caused by the temporary interruption and disruption of its business on account of a partial taking of its laundry and dry cleaning plant through condemnation, (which was during the time that Pilgrim moved from the part taken to the remainder, and rebuilt, re-equipped and readapted the remainder so as to be able to continue their operation of the laundry and dry cleaning plant although on a smaller scale, which plan proved to be finan-

cially unsound and infeasible after several months operations and while Pilgrim thereafter planned, built, and moved into a new plant), totalling $26,455.00 as testified to by Guy Robertson, President of Pilgrim.

He testified that in June of 1969, which was the month of the partial taking of its property, the losses in its operations amounted to $1,396.26; and in July, $3,464.36; in August a loss of $1,981.15; in September a loss of $2,147.08; in October a loss of $2,069.97; and in December a loss of $1,095.82; and in January of 1970, a loss of $1,590.26; and in February a loss of $1,852.85; and in March a loss of $1,272.35; and in April a loss of $1,294.28; and in May a loss of $5,741.50, at which time, Pilgrim shut the operations down at the Almeda Plant (S.F. pp. 116 to 117). The Court qualified the introduction of such evidence as to loss of profits by instructing the jury not to consider such loss of profits, if any, except as to show how it affected the market value of the remainder of the property, if it did, after the taking (S.F. pp. 107, 116). The trial court qualified the introduction of our evidence as to loss of profits occasioned by this partial taking in response to an objection made by the attorney for the Plaintiff as to its admissibility.

Pilgrim Equipment Company of Houston urged this error to the trial court in its Amended Motion for New Trial, assignments of error numbers 2, 3, 5, 12 and 13. Such Motion for New Trial was denied and overruled.

Further, Petitioner presented this ground of error to the Court of Civil Appeals through Appellant's Points of Error Nos. 1 and 5, as set out in Pilgrim's brief filed with such Court, and made a part of this Petition for Writ of

Certiorari. These points were overruled by the Court of Civil Appeals as they affirmed the judgment below.

Such assignments of error 2, 3, 5, 12, and 13, as contained in our Amended Motion for New Trial were further raised for the consideration of the Texas Supreme Court in Petitioner's Application for Writ of Error (P. 6-10a) filed with that Court and made a part of this Petition for Writ of Certiorari. The Points of Error 5, 11, and 12, as contained therein, raised for the Court's consideration are germane to Assignments of Error 2, 3, 5, 12 and 13, mentioned above. Pilgrim's Application for Writ of Error was refused, no reversible error, on April 26, 1972, by the Supreme Court of Texas. A timely Motion for Rehearing in the Supreme Court of Texas was overruled on May 24, 1972.

The case was tried on its merits to a jury starting September 29, 1970. The charge of the Court, which included six special issues, was submitted to the jury on October 3, 1970.

The following special issues were timely requested by Pilgrim in the Trial Court and refused, to wit:

SPECIAL ISSUE NO. 1: From a preponderance of the evidence, what do you find was the amount of the loss of profits, if any, sustained by Pilgrim Equipment Company of Houston on account of the condemnation by the State of Texas and County of Harris of Pilgrim's property known as Tract Numbers 311 and 335?

Answer in dollars and cents.

Answer: _____

SPECIAL ISSUE NO. 2: From a preponderance of the evidence, what do you find was the cost to Pilgrim Equipment Company of Houston, if any, in moving its machinery, equipment and other personal property from Tracts 311 and 335, to the remainder of its property, cause, if you find it was so caused by the State of Texas and County of Harris in the condemnation of said property?

Answer by stating the amount in dollars and cents.

Answer: _____

SPECIAL ISSUE NO. 3: From a preponderance of the evidence, what do you find was the amount of the costs, if any, to Pilgrim Equipment Company of Houston in moving its machinery, equipment and other personal property from the part condemned in the remainder to its location on Stella Link Road, caused by the State of Texas and County of Harris, by the condemning of Tracts 311 and 335? Answer by stating the amount, if any, in dollars and cents.

Answer: _____

SPECIAL ISSUE NO 4: From a preponderance of the evidence, what do you find was the cost to Pilgrim Equipment Company of Houston, if any, in adapting the remainder of its property to use in the continued operation of its laundry and dry cleaning business caused by the condemnation of Tracts 311 and 335 by the State of Texas and County of Harris? Answer by stating the amount, if any, in dollars and cents.

Answer: _____

The timely requesting of such special issues shows that the Federal questions involved in this case were timely raised by the Petiitoner, Pilgrim Equipment Company of Houston, in the Trial Court.

At the beginning of the trial, it was stipulated and agreed by the parties, through their attorneys, that the date of actual taking of the property under condemnation was June 10, 1969, and that the only issues remaining to be adjudicated between the parties were: (1) the market value as of the date of taking of the land and improvements thereon owned by said Defendant and being condemned by Plaintiffs; and, (2) the other damages, if any, payable to the Defendant, Pilgrim Equipment Company of Houston, on account of the condemnation herein (Tr. p. 67).

Under the jury verdict, judgment was entered in favor of the Defendants for the sum of $61,846.00 for the land and improvements which were actually condemned and for the sum of $37,320.00 for the damages to the remainder of the Defendant's land and improvements, making a total of $99,166.00 and the judgment awarded the land and improvements under condemnation to the Plaintiff, the State of Texas, and the judgment provided that the Plaintiffs, the State of Texas and County of Harris, recover from the Defendants, Pilgrim Equipment Company of Houston and Southland Life Insurance Company, the sum of $45,834.00, plus interest thereon at the rate of six per cent per annum from date of judgment until paid, such sum being the amount by which the award of the special commissioners exceeded the verdict of the jury and said judgment taxed the cost of the proceedings before the special commissioners and of the Court against

the Defendant, Pilgrim Equipment Company of Houston, since the amount offered by the Plaintiffs to said Defendant of $118,366.00 prior to the institution of suit in eminent domain was in excess of the verdict of the jury (Tr. pp. 73-74), said judgment being signed and entered on December 1, 1970.

Argument and Authority

Pilgrim Equipment Company of Houston, herein called Petitioner, now prays that this Honorable Court take heed of our right set up under the Constitution of the United States and grant this Writ of Certiorari for the following grounds and reasons:

The right your Petitioner is seeking to protect is granted in 28 U.S.C.A. Const. Amend. V, wherein it is provided, "No person shall be deprived of life, liberty or property without due process of law; or shall private property be taken for public use, without just compensation." It is our contention that the term "just compensation" and "adequate compensation" include all damages sustained by the landowner. Therefore, at the very outset, let us say that the damages as sustained by the Petitioner on account of this partial condemnation include (1) the reasonable market value of the land taken, (2) damages to the remainder, namely, the difference between the reasonable market value of the remainder immediately before and immediately after the taking, (3) loss of profits sustained by the Petitioner caused by the interruption of its business and other causes on account of the taking, (4) the cost of readapting the remainder of the property for continued use thereof as a laundry and dry cleaning business, and (5) moving and relocating expenses from

the part taken to the remainder and later from the remainder to a new location made necessary by the condemnation. It is our position that Petitioner is legally and lawfully entitled to recover in this cause its loss of profits, moving costs, and costs of readapting the remainder of its property as separate items of damage and/or consequential damages suffered by said Petitioner on account of said partial taking of its property through condemnation. However, in the alternative, the evidence introduced by Petitioner in its Bill of Exception (S.F. 123-154) concerning moving costs and cost of readapting the remainder of its property should have at least been admitted by the trial court for consideration by the jury in determining the market value of the remainder of Petitioner's property immediately after the taking. However, we would submit to this Court that any such limitation or qualification made by a Trial Court so as to implement this alternative would not afford the Petitioner *just* and *adequate* compensation as guaranteed to it under and by virtue of the aforementioned articles of the Federal and State Constitutions.

The ultimate question for consideration by this Court is the meaning and scope of the phrase "just compensation" as it is contained in our Federal Constitution. We believe that the authorities in the State of Texas uniformly hold that in condemnation cases the landowner is to be made whole. In other words, he is to be placed in just as good a position after the condemnation as he was before.

Under the case of *City of Houston v. Lee M. Fox*, 429 S.W.2d 201, Civ. App., Houston (1st District), the Court stated the following well established principle of law:

> "The amount of damages allowed in a proceeding for the condemnation of a part of a tract of land for street or road purposes covers all lawful elements of damages, whether direct or consequential, that could reasonably have been foreseen and determined at the time of condemnation."

Certainly lawful elements of damages, both direct and/or consequential, that could reasonably have been foreseen and determined at the time of this condemnation in the instant case were moving costs, and cost of readapting the remainder of Pilgrim's property, as well as loss of profits sustained by Petitioner.

Magnolia Pipe Line Company v. City of Tyler, 348 S.W.2d 537, (Civ. App., Texarkana), among other things, says:

> "Every loss or diminution of what is one's own, occasioned by fault of another, whether it results directly to things owned or merely interferes with owner's right to legal and proper use thereof, constitutes 'damages' within Constitutional provisions prohibiting the taking or damaging of property for public use without adequate compensation." Vernon's Ann. St. Const. Art. 1, Section 17.

Certainly, cutting through and chopping off one-third of the first floor of the main laundry and dry cleaning plant of Pilgrim in the instant case and the adjoining one-story corrugated iron building used in connection therewith was a direct loss and diminution to Pilgrim and, furthermore, a very serious and costly interference with the right which it had to use and operate its property as a laundry and dry cleaning plant necessary to serve the 160 retail stores and pick-up stations which it owned and operated in and around the City of Houston.

In *Northern Natural Gas Company, Appellant, v. Claude Johnson, et al, Appellees*, 278 S.W.2d 410, Civ. App., Amarillo, 1954 (reh. den. 1955), the general principle is, of course, well established that just compensation in condemnation must be measured by the owner's loss and not by the taker's gain.

Hart Bros. v. Dallas County, 279 S.W. 111, Commission of Appeals, deals with the partial taking of the landowner's property through condemnation upon which, at the time of taking, there was being operated an established business. The condemnee made a case of a temporary interference for a definite time with such business whereby they sustained a loss of profits and were compelled to make necessary improvements, in amounts easily ascertainable. They continued to use their business as adapted to the change in conditions (all of which fits like a glove the facts in the instant case). The Court in that case held:

> "Under those circumstances, there is no doubt but that they are entitled to recover damages in such sum as will compensate them for the loss of the profits they would have derived and the expenditures they were required to make, during the temporary interruption of their business. Otherwise, they would not get full compensation for their loss.
>
> "It is in no sense a double recovery to allow damages for injury to one's land or interest therein, and at the same time to allow damages for injury to his mercantile or other business directed thereon. It takes both to compensate for the full loss where the land and the business as well have been damaged."

The evidence in the instant case clearly shows that on account of the partial taking of Petitioner's plant, it was necessary for it to spend several thousands of dollars mov-

ing and rearranging equipment and acquiring other machinery and equipment and making certain costly repairs to the remainder of its property in order to continue providing laundry and dry cleaning service. Such loss of profits and moving costs and costs of readapting the remainder were definitely testified to by the President of the Petitioner and should be included in a landowner's recovery of "just compensation" for private lands taken for public use.

The cornerstone case in this State concerning recovery of loss of profits to a landowner's business caused by temporary obstruction of a highway (which we think likewise applies to the facts in the instant case, there being a partial taking of the Petitioner's property and loss of profits to its business) is the case of *City of LaGrange v. Pieratt, et ux*, 175 S.W.2d 243, Supreme Court of Texas, the opinion of which was written by the very eminent and learned Justice Critz.

This was a suit by Pieratt and wife against City of LaGrange to recover loss of profits in Plaintiff's business caused by temporary obstruction of a highway. The Plaintiff was the owner and operator of a gasoline filling station. The Plaintiff's loss was occasioned by the temporary obstruction of the highway for several months while it was being widened, paved and otherwise reconstructed and improved by the State Highway Department acting under authority of a contract with the City. Under such contract, the State Highway Department did the work and paid the cost of improvements. It is interesting to note that the special commissioners awarded the Plaintiff damages in the amount of $100.00 for moving house, $100.00 for moving tanks, $20.00 for rebuilding toilet, $50.00 for

lights, $150.00 for placing gravel and $100.00 for land and damages. The Supreme Court of Texas noted:

> "As we interpret the above report (meaning report of special commissioners), it shows, as a matter of law, that the commissioners considered and awarded compensation for all elements of damage, direct and consequential, which the law contemplates in such a proceeding."

Justice Critz in his opinion said:

> "[1] Our laws regarding eminent domain make provision for two distinct condemnation situations: (a) the taking of the whole of a tract of land, and (b) the taking of only a part. In this case we are dealing with the taking of a part of a tract.
>
> [2] Damages in condemnation proceedings are limited to damages to property. Property must either be taken or damaged. Harris County v. Gerhart, 115 Tex. 449, 283 S.W. 139; 16 Tex. Jur., page 976, Section 300.
>
> [3, 4] For it to be considered that damages are to property, it is not necessary that such damages are to be measured by the extent of the injury to the physical property itself. A right of recovery is established by proof of injury to some right of property, and the damages are measured by the extent of the injury to that right. Thus, a business is property, and the reasonable damages for interference with the access to business property may be measured * * * by the loss of profits." 16 Tex. Jur. pp. 976-978, and authorities there cited; Hart Bros. v. Dallas County, Tex. Com. App., 279 S.W. 111.

Also relevant to this inquiry as to whether or not "just compensation" is afforded the landowner, absent a re-

covery of consequential damages sustained by him as a result of a partial taking, would be a careful reading of Vernon's Ann. Civ. St. Art. 3265, which is set out in full at Pages 5-7 of this Petition.

It should be noted that under Section 2 thereof, which deals with the partial taking of a tract, "the commissioners shall estimate the injuries sustained and the benefits received thereby *by the owner;* whether the remaining portion is increased or diminished in value by reason of such condemnation, and the extent of such increase or diminution and shall assess the damages accordingly." (Emphasis ours) In this situation, that of a partial taking, the above mentioned statute speaks of "injuries or benefits" received by the *owner* and not diminution in the *market value* of the land condemned. In the face of this Article and 28 U.S.C.A. Const. Amend. V, we would urge this Court to recognize that the Court of Civil Appeals, Houston, 1st Supreme Judicial District of Texas, erred by refusing to reverse and remand the judgment of the trial court on account of the error committed by said Court in refusing to allow the introduction of evidence timely presented by your Petitioner, as to moving costs and cost of readapting the remainder of the property so as to render it useful to Petitioner. We contend that such expenses constitute damages which have accrued to the landowner (Petitioner) as a result of this partial taking. Further, we would contend that the question of "adequate" or "just" compensation was not properly submitted to the jury because of the qualification placed upon the introduction of evidence relating to the loss of profits sustained by your Petitioner. Such qualification being to the effect that such evidence would be limited in its probative force, *i.e.*, only as to its bearing, if any, on the market value of the re-

mainder immediately after the taking. We would urge to this Court that this qualification and limitation on the probative force of this evidence (loss of profits) has operated to deny your Petitioner a right set up under the Federal Constitution.

City of San Antonio, et al, v. the Congregation of the Sisters of Charity of the Incarnate Word, Inc., 404 S.W. 2d 333 (Tex. Civ. App., Eastland, 1966). In this case the Court cited, *State v. Waco Independent School District*, 364 S.W.2d 263 (writ ref., n.r.e.) with approval:

> "[8] In the Waco Independent School District case, there were special damages for which the market value rule would not provide adequate damages. Under State and Federal Constitutions, a landowner whose land or a portion thereof is taken is entitled to adequate compensation. The Waco Court of Civil Appeals observed and complied with such Constitutional requirements. This Court also obviously and necessarily construed the provisions of Article 3265 in such a way that it would not be in conflict with the Constitutional requirement in special damage cases. * * *
>
> [9, 10] We do not believe that it was a holding in the Waco case, even by implication, that the owner of the private school whose land is condemned is, under the provisions of Article 3265, limited to a recovery under the market value test if the evidence shows that such test will not adequately compensate the owner for special damages suffered. In our opinion, a private school such as Appellee, the same as a public school, is not by reason of Article 3265 denied the right to adequate compensation. * * *

We believe that the proper scope of this Constitutional right was determined by the Supreme Court of Georgia

in *Caleb J. Bowers v. Fulton County*, Jan. 7, 1966, 146 S.E.2d 884, reh. den., Feb. 2, 1966. Herein the Court decided that the provision in the Georgia Constitution providing for just and adequate compensation for private property taken through eminent domain means that the condemnee is entitled to be compensated for *all* damages done to his property and expenses caused by the condemnation proceeding as separate and distinct items from the amount which he is entitled to recover as actual value of his building.

It is also interesting to note that the Texas legislature has enacted at least two articles which recognize moving expense as a proper item of recovery in an eminent domain case.

Section 7 of Article 3265, RULE OF DAMAGES, was added by Acts 1969, 61st Leg. p. 2293, Ch. 772, Section 1, eff. September 1, 1969, is one such enactment, set out verbatim on page 7 of this Petition for Writ of Certiorari. In our opinion, Section 7 of Article 3265, V.A.T.S., does not apply in this case for the reason that the section specifically states that it shall not apply in any condemnation proceeding whether before special commissioners or the court where the owner is entitled to reimbursement for moving expenses under other existing law. It is our contention that the Petitioner is entitled to reimbursement for moving expenses under both State and Federal Constitutions and the case law of this State. If, however, it should be concluded that such moving expenses were only recoverable but by virtue of this Section, how do we reconcile the trial court's refusal to admit evidence as to moving costs and the holding by the Court of Civil Appeals that your Petitioner failed to request an issue necessary for

recovery under Section 7. As a result of the trial court's exclusion of this evidence, there was no issue of fact relative to moving expenses before the jury for their determination. Such being true, your Petitioner was deprived of "just compensation" for its lands taken for public use and "due process of law" under our Federal Constitution.

Petitioner would also point to Article 6674n-4 of V.A.C.S., (now Article 3266-b) regarding moving expenses and state that same is not mandatory, but to the contrary, is merely permissive and left entirely to the discretion and will of the State Highway Commission as limited by the Federal Highway Relocation Assistance Program. Any decision made under this statute can be arbitrary and the landowner cannot do anything about it. In short, such statute does not afford Petitioner due process of law or any procedure by which it can legally recover any moving costs or expenses whatsoever. Such statute should not and cannot be construed to deprive your Petitioner of its legal rights under the Federal and State Constitutional provisions to have and recover just and adequate compensation. It is significant to point out that neither of the Articles of the statutes mentioned provide for any reimbursement or compensation for the costs of repairing, rebuilding, or readapting the remainder of the property where there has been a partial taking.

Petitioner now contends that moving costs, costs of readapting the remainder for future use in the same manner as before the taking, and loss of profits sustained by condemnee as a result of a partial taking are recoverable as a separate item of damage. These are items of expense which were incurred by the Petitioner as a result of the taking. The essence of the whole cause in the trial court

was the amount of damages sustained by the landowner. The Court of Civil Appeals held that the above items were not specially plead, so as to show that the damage sought was within the jurisdiction of the County Court at Law in which the case was tried. We urge that such standard does not apply to pleadings in a condemnation case. *City of Houston v. E. Huber,* 311 S.W.2d 488, Court of Civil Appeals of Texas:

> "It is not necessary for a property owner, objecting to an award of the Commissioners in condemnation proceedings, to particularize as to his damages. See Fitzgerald v. City of Dallas, Texas Civ. App., 34 S.W.2d 682, err. ref. It was not necessary, therefore, for the objections filed by any of the landowners to specify the damages sustained by such owner, or by Appellee, E. Huber."

State of Texas v. Honorable Ernest A. King, Judge of the County Court of Ward County, et al., 437 S.W.2d 420, Court of Civil Appeals of Texas:

> * * * "These cases and others have held, in the State of Texas, that strict or formal pleading requirements do not apply to objections which appeal condemnation commission proceedings. The sufficiency of objections, therefore, is not measured by the same standards applicable to pleadings in other causes of action. City of Teague v. Stiles, 263 S.W. 2d 623 (W. ref. n.r.e.). * * *"

These last two cases discussed hold that it is not necessary for a property owner to particularize his damages in condemnation proceedings and, furthermore, that the sufficiency of objections to the award of the special commissioners is not measured by the same standards appli-

cable to pleadings in other causes of action. Further, Petitioner would point out to this Honorable Court that no objection was ever raised against the introduction of our evidence on moving costs and costs of readapting the remainder by Plaintiffs on the grounds of "no pleadings". Our offer of such evidence was excluded and a Bill of Exceptions was promptly made. The evidence offered by your Petitioner as to loss of profits was qualified and limited by the Court. Petitioner would argue that its grounds for appeal have been adequately preserved in the trial court and specifically brought to attention. Petitioner would submit that the following actions: (1) offering such evidence, (2) making a Bill of Exceptions, and (3) requesting special issues on the same, were surely enough to place the trial court on notice as to our contentions and exceptions with respect to the exclusion of such evidence. Further, the Court of Civil Appeals has held that our points of error IV, V and VI, as contained in Appellant's brief, were not specifically presented to the trial court by a Motion for New Trial and thus could not be considered upon appeal. We would urge that such points were presented to the trial court in our Amended Motion for New Trial through Assignments of Error 2, 3, 5 and 13, as contained in the Amended Motion for New Trial. We believe that Points of Error I, IV, V and VI fairly and reasonably point out that the judgment rendered by the trial court was inadequate because "just compensation" was denied through the trial court's refusal to admit testimony offered during the trial on moving costs and costs of readapting the remainder, as well as their qualifying the evidence admitted on loss of profits. This ground of appeal was presented to the trial court in our amended Motion for New Trial and to the

Court of Civil Appeals in Appellant's brief. This interpretation of our Points of Error is required after a proper reading of Rule 1 of Texas Rules of Civil Procedure entitled "Objective of Rules" which provides, to wit:

> "The proper objective of Rules of Civil Procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at least expense both to the litigants and to the State as may be practicable, *these rules shall be given a liberal construction.*" (Emphasis ours.)

Rule 321, Texas Rules of Civil Procedure, says, "Each ground of a motion for new trial * * * shall briefly refer to that part of the ruling of the Court, charge given or refused, admission or rejection of evidence or other proceeding complained of in such way that the point of objection can be clearly identified and understood by the court." Certainly in our case the points of objection raised by the Defendant, Pilgrim Equipment Company of Houston, were clearly identified by the Assignments of Error heretofore referred to and there can certainly be no question but that they were understood by the court.

In closing it should be pointed out that the term "property"[2] as contained in the Federal Constitution has been employed to denote the group of rights inhering in a citizen's relation to the physical thing, as the right to *possess, use* and *dispose* of it. (emphasis ours). Its meaning has been expanded beyond its untechnical sense of

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2. United States v. General Motors Corp., 65 S.Ct. 357, 323 U.S. 373.

the physical thing to which the citizen exercises rights recognized by law. Your Petitioner has been dispossessed of these "rights" which are inherent in its relation to the physical thing taken, i.e., the land. The loss of these "rights" has left Pilgrim Equipment Company of Houston with a deficit that is not remote or speculative, is not divorced from the land taken, and which can be adequately measured in dollars and cents. The taking of this fee simple interest in lands owned by your Petitioner has left it without such interest and all natural advantages which would flow from such ownership. Our only recourse is to look to the Supreme Law of our land for just compensation.

Conclusion and Prayer

The damages sustained by Petitioner in the way of moving costs and costs of readapting the remainder and loss of profits were foreseeable before and at the time of said condemnation and/or damages that the Petitioner is legally entitled to recover under and by virtue of the provisions of the State and Federal Constitutions and statutes of the State of Texas concerning condemnation and eminent domain and the court decisions. When private lands are taken for public use, the landowner must be made whole. The burden of public improvements must be placed on the shoulders of the general public and taxpayers.

We would suggest to the Court that this case, as presented in this Petition for Writ of Certiorari, is a prime example of a situation wherein the inadequacies of the "market value test" for compensating landowners in condemnation proceedings are exposed. The Constitu-

tional dictates of "just compensation" for private lands taken for public use necessarily implies some flexibility in application. We believe that a partial taking of land upon which is maintained and operated a successful business is such a situation which calls out for a more liberal, flexible and just application of this Constitutional right.

The trial court committed error by refusing to allow the Petitioner to introduce evidence as to moving costs and to the cost of reconstruction and readapting the remainder of Petitioner's property necessary for the continuation of the operation of its laundry and dry cleaning plant and the Court of Civil Appeals erred by not reversing and remanding the judgment of the trial court on account of said error.

The trial court erred by qualifying and limiting the evidence introduced by the Petitioner as to loss of profits since such loss occurred during the temporary interruption of Petitioner's business on account of the partial taking of its property by condemnation and the Court of Civil Appeals erred by not reversing and remanding the judgment of the trial court on account of such error.

The Court of Civil Appeals erred in holding that the question of adequate compensation was submitted to the jury since there was not included in the question of adequate compensation moving costs or costs of readapting the remainder of Petitioner's property and could not have been so submitted as the trial court refused to allow such evidence to go before the jury.

The Court of Civil Appeals erred in holding that the loss of profits cannot be recovered as an item for damage separate from that resulting from the depreciation in value of the remainder.

Wherefore, Petitioner respectfully prays that this Petition For Writ of Certiorari to the Court of Civil Appeals, Houston, 1st Supreme Judicial District of Texas be granted, and upon such hearing, that the Court grant Petitioner's Writ and the relief sought therein.

Respectfully submitted,

LEWIS W. CUTRER
JAMES E. HAYS
Counsel for Petitioner
3901 Westheimer, Suite 301
Houston, Texas 77027

APPENDIX A

In The Supreme Court of Texas

April 26, 1972

No. B-3135

Pilgrim Equipment Company of Houston

vs.

The State of Texas

From Harris County
First District

Application of petitioner for writ of error to the Court of Civil Appeals for the First Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Pilgrim Equipment Company of Houston, and surety, American Employers' Insurance Company, pay all costs incurred on this application.

No. B-3135

May 24, 1972

Pilgrim Equipment Company of Houston	)	
	)	From Harris County
vs.	)	First District
	)	
The State of Texas	)	

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 3rd day of August, 1972.

GARSON R. JACKSON, Clerk

By: /s/ Eugene Cervenka, Deputy
Eugene Cervenka

Affirmed, and Opinion filed November 4, 1971.
TFC/b

NO. 15,811

PILGRIM EQUIPMENT COMPANY
OF HOUSTON, *Appellant*,
vs.
THE STATE OF TEXAS ET AL, *Appellees*.

Appeal from County Civil Court at Law
Of Harris County

This is a condemnation case. Judgment was entered based on a jury verdict. The land owner has appealed,

Six special issues were submitted to the jury. The land was taken from two separate tracts under single ownership. The issues related to the market value of the land taken and the damage to each of the tracts resulting from the taking.

Appellant's first three points complain that the judgment did not allow appellant just or adequate compensation; that the answer made by the jury to Special Issue No. 2 was conflicting and inconsistent with its answer to Special Issue No. 1; and that the answer to Special Issue No. 2 "was not supported by a preponderance of the evidence", and therefore that the court erred in entering judgment thereon.

The second and third points are based on the seventh assignment of error in appellant's motion for new trial reading: "The Court erred in not setting aside the answers of the jury to the Special Issues since such answers were inconsistent, incompatible and in sharp conflict with one another and contrary to the preponderance of the evidence introduced."

Rule 374, T.R.C.P., provides that a ground of error not distinctly set forth in the motion for new trial shall be considered as waived.

The assignment of error is directed to the entire verdict. It does not point out the particular answers that are alleged to be in conflict or inconsistent. The alleged error brought to the attention of the trial court by the assignment was the failure to set aside the verdict, which would have required a new trial. The attention of the court was not specifically directed to the point now raised, i.e., that the answers to Special Issues 1 and 2 are conflicting and inconsistent. No conflict or inconsistency is apparent from reading the issues and the answers made thereto. Appellant's Point 2 is without merit, and cannot be considered. Garvel v. Young, 407 S.W.2d 518 (Tex. Civ. App.—Houston 1966, writ ref., n.r.e.).

Since appellant, in the Amended Motion for New Trial, failed to state that the evidence supporting the jury answer to any specific special issue was either insufficient or against the great weight of the credible evidence, this court has no jurisdiction to consider Point 3. Darryl v. Ford Motor Co., 440 S.W.2d 630 (Tex. 1969).

By Point No. 1 appellant contends that the judgment based on the jury verdict did not allow appellant just

and adequate compensation required by the Constitutions of the United States and the State of Texas. The Constitution of the United States, Amendment V, requires payment of "just" compensation for property taken for public use. The Constitution of the State of Texas, Art. 1, Sec. 17, requires "adequate" compensation for property "taken, damaged or destroyed for or applied to public use."

The trial court has entered judgment for appellant in the amount found by the jury in answer to issues submitted in the language suggested by State v. Carpenter, 89 S.W.2d 194 (Tex. 1936). The question of "adequate compensation" was submitted to the jury. Brunson v. State, 444 S.W.2d 598 (Tex. 1969).

Since the answers made to these issues are supported by credible evidence, this court cannot substitute its opinion of the value of the property for that of the jury. By this point appellant does not present the question that the answers are contrary to the great weight and preponderance of the evidence. Point No. 1 is too general to constitute a basis for the reversal of the judgment. If the judgment is in fact inadequate, that result must have followed from the error of the trial court refusing to admit competent testimony offered at the trial; from the error of the trial court in manner of submitting the case to the jury; from the failure of the jury to answer the issues submitted in accordance with the weight and preponderance of the evidence; or from some such specific matter. It is appellant's burden to determine the specific matter which he contends constituted error and probably resulted in the rendition of an improper judgment. This matter must then be presented in accordance with the

procedural rules established by law or adopted by the Supreme Court to govern the trial and appeal of civil cases in this State. Art. 3266, V.A.C.S.; Hale v. Lavaca County Flood Control Dist., 344 S.W.2d 245 (Tex. Civ. App.—Houston 1961); Ingram v. Nueces County, 365 S.W.2d 838 (Tex. Civ. App.—San Antonio 1963).

Appellant contends that the trial court erred in rendering the judgment herein because appellant was entitled to recover (1) damages for the loss of profits suffered by reason of the partial taking; (2) the cost of readapting the remainder of its property for continued use as a laundry and dry cleaning plant; and (3) the moving costs caused by the partial taking.

These points of error are stated to be based Assignments of Error Nos. 2, 3, 5, and 13.[1] The points are too

1. "Second—The Court erred in its ruling on the Motion in Limine filed by Plaintiffs herein particularly by limiting and qualifying the evidence that the Defendants could introduce concerning moving cost and cost of readapting the remainder of their property for use as a laudry and cleaning establishment and loss of profits in the operation of their business as a result of and on account of the condemnation of a part of their property which is described in Plaintiffs' pleadings filed herein.

"Third—The Court erred in refusing to admit and/or qualifying and commenting upon the evidence introduced or to be introduced by the Defendants at the trial of this cause regarding moving cost, loss of profits, cost of adapting remainder of their property for use previously made thereof and other expenses suffered and sustained by the Defendants on account of the condemnation of their property hereunder, same being in violation of Amendment V. of the Constitution of the United States and Article 1, Section 17 of the Constitution of the State of Texas, since such items represented actual damages sustained by the Defendants on account of the condemnation of their prop-

general to comply with the briefing rules. Rule 418, T.R.C.P. Neither of the points complains that the court erred in admitting evidence offered by appellant with improper qualifications, nor do they complain that the trial court erred in refusing to submit properly requested issues. The points are germane to the assignments of error only in the sense that the matters complained of in the assignments of error made it impossible for appellant to secure jury findings on which to base a judgment for the specific additional damages he contends he was entitled to receive under the Constitutions of the United States and the State of Texas. These points were not specifically presented to the trial court by the motion for new trial, and this court is not authorized to consider them. Wagner v. Foster, 341 S.W.2d 887 (Tex. 1960); Wood v. State, 434 S.W.2d 149 (Tex. Civ. App.—Corpus Christi 1968); Daniels v. Daniels, 414 S.W.2d 207 (Tex. Civ. App.—Amarillo 1967); Baker v. Sturgeon, 361 S.W.2d 610

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erty and represented just compensation to which they were legally entitled.

"Fifth — The Court erred in refusing to submit to the Jury the Special Issues which were duly and timely presented to the Court by the Defendants concerning moving cost suffered by the Defendants and also the cost of adapting the remainder of Defendants' property so that they could continue to operate a laundry and cleaning establishment thereon and also the loss of profits sustained by said Defendants on account of such partial taking, which under the preponderance, if not all of the evidence introduced, showed that due to such partial taking the Defendants had to relocate their business at substantial cost, expense and damages.

"Thirteenth—The Court erred in signing and entering the judgment for Plaintiffs herein, same being in violation of Amendment V. of the Constitution of the United States and of Article 1, Section 17 of the Constitution of the State of Texas."

(Tex. Civ. App.—Texarkana 1962); City of Carollton v. Rawlins, 291 S.W.2d 955 (Tex. Civ. App.—Eastland 1956, error ref.).

A consideration of appellant's points on the merits leads to the conclusion that the trial court did not err in refusing to allow recovery as separate items of damages the loss of profits sustained by appellant's business, or the moving costs incurred by appellant, as the result of the condemnation of a portion of appellant's property.

As a consequence of the taking on Tract 311 the building housing appellant's laundry and dry cleaning plant was severed, about 4,900 square feet of the building being within that portion of the tract taken, leaving about 8,000 square feet on the remainder. Equipment necessary to the operation of the entire plant was located within the part taken, including the steam boiler, water softener, air conditioning equipment, and a large flat press. Obviously a new wall would be required if the operations in the plant were to continue. At the time of this trial the building itself had not been severed. However, appellant had severed the water, steam, air conditioning ducts, and electrical lines prior to trial, and had removed all personal property from the area taken. This was necessary by reason of the fact that appellee had deposited the commissioners' award in the registry of the court.

There was testimony that the highest and best use of the property on June 10, 1969, the date of taking, was the use then being made of the property, that is, use of the property as a laundry, main plant and central offices, maintenance and carpenter shop, servicing a chain of 160 retail laundry and cleaning outlets. Both tracts of land, Tract 311 and 335, served as an over-all unit in

the operation of the business. The buildings on both tracts had been adapted to a special use where every square foot served a purpose. There was other testimony by expert witnesses produced by appellee that the highest and best use for the property was for laundry and dry cleaning purposes.

Appellee permitted appellant four months after the date of the taking to remove his business operations from that portion of the building taken. The business was disrupted during this period, and to some extent thereafter. Pilgrim's president testified that the remainder was not large enough for the dry cleaning assembly line, so that this operation was transferred to the Pasadena plant. There was not enough space for the large flat work ironer and a smaller one was installed in the remainder. This equipment would not take care of the work, and there was not enough storage space in which to store both the incoming material and the completed work. The company had a smaller plant on Stella Link, which it continued to operate, but it discontinued this type work at the subject property because it was not profitable in the small scale operation. At the time of the trial he had not been able to locate a suitable property for a new plant capable of handling the flat work operations.

By the end of the four month period the administrative offices, the carpenter shop, parts department, the labor office and the maintenance department had been transferred to another location. These activities were operated from the same location for economic reasons and there was not sufficient room in the remainder for all of them. The closing of the assembly lines in the Almeda plant made it necessary to discontinue most of the home pick-up and delivery routes.

The operation continued at the Almeda plant in the remainder at a reduced scale until it was abandoned for all purposes except as a retail pick-up and delivery station. Appellant had 160 different retail outlets. Prior to the date of taking the Almeda plant did flat work for 75% to 80% of the outlets. Appellant acquired land at 6723 Stella Link for its new main plant. It took about eighteen months to find a desirable location, purchase it, get some zoning restrictions removed, construct a building, install the necessary equipment, and begin operations. This plant was not designed for the flat work operation. Mr. Robertson, appellant's president, testified that by reason of the condemnation in his judgment it was no longer feasible to continue to operate the Almeda plant.

Appellant was permitted to introduce testimony as to the profits and losses sustained by the Almeda plant from January, 1969, to and including May, 1970, at which time the plant was shut down except for the retail operation. Substantial profits were shown for each month prior to the date of taking, and substantial losses were shown for each month after the date of taking. The trial court instructed the jury that the evidence concerning the profits and losses was admitted not as evidence tending to sustain such profits or losses as a separate item of damages, but that such evidence was admitted "as affecting the market value, if it does, of the remainder of the land and improvements on the subject property after the taking for the uses to which that remainder was adapted and was being put, and for that purpose only." Appellant made no objection to this instruction, and cannot now be heard to complain of this action of the court. Substantially the same instruction was included in the court's charge. If

objections were made to the court's charge, they were not included in the transcript.

Appellant's Requested Issue No. 1, refused by the court, reads:

> "From a preponderance of the evidence, what do you find was the amount of the loss of profits, if any, sustained by Pilgrim Equipment Company of Houston on account of the condemnation by the State of Texas and County of Harris of Pilgrim's property known as Tracts Numbers 311 and 335?"

While appellant has no point complaining of the failure of the trial court to submit this special issue, under his point charging the court with error in entering the judgment herein because of the failure to allow damages by reason of lost profits, he points to the action of the court in limiting the evidence as above set out and in refusing the special issue. These matters were sufficiently preserved in the motion for new trial. The claimed error in limiting the testimony was waived by appellant's failure to object to the instructions limiting the purpose for which the jury could consider the evidence relating to profits and losses at the various times such an instruction was given. King v. Roberts, 84 S.W.2d 718 (Tex. 1935); Texas-Mexican Ry. Co. v. Creekmore, 204 S.W. 682 (Tex. Civ. App.—San Antonio 1918, err. dism'd); Mayberry v. Campbell, 356 S.W.2d 827 (Tex. Civ. App.—Amarillo 1962, writ ref., n.r.e.).

The requested issue was not a proper inquiry. It does not restrict the jury to a finding of profits lost by reason of a temporary disruption of its business. It was appellant's contention that by reason of the taking the property was

no longer suitable for the use to which it had been devoted prior to the taking. Evidence of losses caused by permanent injury to the business was before the jury. Such a loss cannot be recovered as an item of damage separate from that resulting from the depreciation in value of the remainder. State v. Zaruba, 418 S.W.2d 499 (Tex. 1967); City of Dallas v. Priolo, 242 S.W.2d 176 (Tex. 1951); Huckabee v. States, 431 S.W.2d 927 (Tex. Civ. App.—Beaumont 1968, writ ref., n.r.e.); Reilly v. State of Texas, 382 S.W.2d 116 (Tex. Civ. App.—San Antonio 1964, ref., n.r.e).

The refusal of appellant's special issue designed to establish the expense of removing the personal property from the property taken to other property belonging to appellant was not error. These expenses might well result in a temporary loss of profit for the business. Unless compensation can be recovered for these items in that context (a question we do not decide here), it cannot be recovered in this action. These special items of damage were not specially plead, consequently it was not shown that the damage sought was within the jurisdiction of the County Court at Law in which the case was tried. These items may well constitute "damage" to appellant, but the cost of removing the personal property does not constitute "damage" to appellant's "property". Jurisdiction of this cause of action is statutory. Article 3265, V.A.C.S., prescribes "market value" as the test of adequate compensation in condemnation proceedings. City of San Antonio v. Congregation of the Sisters of Charity of the Incarnate Word, Inc., 404 S.W.2d 333 (Tex. Civ. App.—Eastland 1966, no writ). Neither Sec. 17, Article 1 of the Constitution, nor Article 3265, V.A.C.S., authorizes the County Court to entertain a cause of action for damages in a

condemnation case other than such damage to "property" as results from a taking for public use, subject to the exception contained in Sec. 7 of Art. 3265 specifically authorizing the recovery of moving expenses where the owner of land is "actually and physically displaced and permanently moves from . . . his place of business and limiting such recovery to the reasonable expense of moving the property, not to exceed $5,000.00 or the market value of such property." Appellant failed to request issues necessary for a recovery under Sec. 7. State v. Carpenter, 89 S.W.2d 979 (Tex. 1936); Kennedy v. City of Dallas, 201 S.W.2d 840 (Tex. Civ. App.—Dallas 1947, writ ref.); State v. Vaughan, 319 S.W.2d 349 (Tex. Civ. App. —Austin 1959, no writ).

Appellant's Point 7 does not present error. At several places in the record testimony was presented without objection that appellant had listed the remainder property for sale with the wall reconstructed on the south remainder. When a witness was asked "how much the real estate dealer was trying to get for the property," an objection was promptly sustained.

Appellant contends that the case must be reversed by reason of certain statements made by appellees' attorney during jury argument, contending that such argument was so prejudicial that its effect could not have been removed by an instruction from the trial judge. The attorney asked the jury "to be just as fair to the taxpayers of Harris County and the State of Texas as to the stockholders of Pilgrim Equipment Company." The arguments of counsel were not transcribed and appellees do not concede that this statement was made. An informal bill of exception is found in the statement of facts.

A review of the entire record leads us to the conclusion that no reversible error was shown. It is conceded that no objection was made at the time and that the trial judge was not requested to instruct the jury to disregard the statement. We do not think that the record demonstrates that such argument resulted in the rendition of an improper verdict or judgment. Kittrell v. State, 382 S.W.2d 273 (Tex. Civ. App.—Dallas 1964, ref., n.r.e.); Camp v. Commissioners Court of El Paso County, 279 S.W.2d 927 (Tex. Civ. App.—El Paso 1955, ref., n.r.e.).

Appellant complains of the action of the trial court in sustaining appellees' motion in limine to prohibit appellants' counsel from showing that the witness Hughes had earlier been employed by appellees to appraise appellant's property and that he was a witness for appellees at the Special Commissioners' hearing. Hughes was subpoenaed as a witness by appellant, but was not called to testify. There was no error in sustaining the motion in limine. State v. Biggers, 360 S.W.2d 516 (Tex. 1962).

The judgment is affirmed.

/s/ Tom F. Coleman

Associate Justice

Judgment rendered and opinion filed November 4, 1971.

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MICHAEL RODAK, JR., CLERK

NO. 72-299

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

PILGRIM EQUIPMENT COMPANY OF HOUSTON,
Petitioner

v.

THE STATE OF TEXAS, ET AL,
Respondents

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, HOUSTON, FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

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INDEX

	Page
QUESTION PRESENTED	2
Did the Court of Civil Appeals err in affirming the Judgment of the Trial Court on the grounds (1) that Petitioner failed to adequately preserve its alleged error and (2) that a consideration of Petitioner's points on the merits relating to such alleged error leads to the conclusion that the trial court did not err in refusing to allow recovery as separate items of damage the loss of profits sustained by Petitioner's business, the costs incurred in readapting Petitioner's remainder property, or the moving costs incurred by Petitioner, all allegedly arising as the result of the condemnation of a portion of Petitioner's property?	
STATEMENT	2
REASONS FOR DENYING A WRIT	5
PRAYER	22
CERTIFICATE OF SERVICE	23

LIST OF AUTHORITIES

CASES

	Page
Baker v. Sturgeon, 361 S.W.2d 610 (Tex. Civ. App. 1962, no writ hist.)	12
Bauman v. Ross, 167 U.S. 548, 17 S.Ct. 966 (1897)	8
Brunson v. State, 444 S.W.2d 598 (Tex. Sup. Ct. 1969)	6
Bullen v. Wisconsin, 240 U.S. 625, 36 S.Ct. 473 (1916)	12
City of Carollton v. Rawlins, 291 S.W.2d 955 (Tex. Civ. App. 1956, err. ref.)	12
City of Dallas v. Priolo, 242 S.W.2d 176 (Tex. Sup. Ct. 1951)	14, 15
City of LaGrange v. Pierratt, 175 S.W.2d 243 (Tex. Sup. Ct. 1943)	14
City of San Antonio v. Congregation of the Sisters of Charity of the Incarnate Word, Inc., 404 S.W.2d 333 (Tex. Civ. App. 1966, no writ hist.)	20
Daniels v. Daniels, 414 S.W.2d 207 (Tex. Civ. App. 1967, no writ hist.)	11, 12
Duignan v. United States, 274 U.S. 195, 47 S.Ct. 566 (1931)	10
East Texas Motor Freight Lines v. Loftis, 148 Tex. 242, 223 S.W.2d 613 (Tex. Sup. Ct. 1949)	10
Edwards v. Strong, 147 Tex. 155, 213 S.W.2d 979 (Tex. Sup. Ct. 1948)	10
Gandy v. State, 293 S.W.2d 534 (Tex. Civ. App. 1956, err. ref. n.r.e.)	14

CASES

	Page
Hale v. Lavaca County Flood Control Dist., 344 S.W.2d 245 (Tex. Civ. App. 1961, no writ hist.)	7
Harris v. Windsor, 294 S.W.2d 798 (Tex. Sup. Ct. 1956)	10
Hart Bros. v. Dallas County, 279 S.W. 1111 (Tex. Com. App. 1926)	14
Henson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228 (1958)	12
Herndon v. Housing Authority of City of Dallas, 261 S.W. 2d 221 (Tex. Civ. App. 1953, err. ref.)	16
Huckabee v. State, 431 S.W.2d 927 (Tex. Civ. App. 1968, err. ref.)	15
Husty v. United States, 282 U.S. 694, 51 S.Ct. 240 (1931)	10
Ingram v. Nueces County, 365 S.W.2d 838 (Tex. Civ. App. 1963, err. ref. n.r.e.)	7
Michel v. State of Louisiana, 350 U.S. 91, 76 S.Ct. 158 (1955)	12
Milam County v. Akers, 181 S.W.2d 719 (Tex. Civ. App. 1944, err. ref. n.r.e.)	15
Pennsylvania R. Co. v. Illinois Brick Co., 297 U.S. 447, 56 S.Ct. 556 (1936)	12
Reilly v. State, 382 S.W.2d 116 (Tex. Civ. App. 1964, err. ref. n.r.e.)	14, 15
Rogers v. State of Alabama, 192 U.S. 226, 24 S.Ct. 257 (1904)	12
Sharp v. United States, 191 U.S. 341, 24 S.Ct. 114 (1903)	8
State v. Carpenter, 89 S.W.2d 194 (Tex. Sup. Ct. 1936)	6, 7
State v. Vaughan, 319 S.W.2d 349 (Tex. Civ. App. 1959, no writ hist.)	16
State v. Zaruba, 418 S.W.2d 499 (Tex. Sup. Ct. 1967)	15
Wagner v. Foster, 341 S.W.2d 887 (Tex. Sup. Ct. 1960)	11
Wood v. State, 434 S.W.2d 149 (Tex. Civ. App. 1968, no writ hist.)	11

CONSTITUTION

28 U.S.C.A. Const. Amend. V	5, 6
28 U.S.C.A. Const. Amend. XIV, Sec. 1	5
Vernon's Ann. Tex. Const. Art. 1, Sec. 17	6, 20

STATUTES AND RULES

Article 3265, V.A.C.S.	16, 17, 20
Article 3266, V.A.C.S.	7
Article 3266b, V.A.C.S.	16, 17
Article 6674n-4, V.A.C.S.	16, 17
Rule 469(c) T.R.C.P.	10

TEXTS

14 Cyc. of Fed. Proc., 3rd Ed. 372, Sec. 67.83	12
4 Nichols on Eminent Domain 14-49, Sec. 14.21	8

NO. 72-299

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

PILGRIM EQUIPMENT COMPANY OF HOUSTON,
Petitioner

v.

THE STATE OF TEXAS, ET AL,
Respondents

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, HOUSTON, FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

To The Honorable Supreme Court Of The United States:

The Respondents, the State of Texas and County of Harris, file this opposition to the Petition for Writ of Certiorari filed by Petitioner to review the judgment of the Court of Civil Appeals for the First Supreme Judicial District of the State of Texas.

QUESTION PRESENTED

Did the Court of Civil Appeals err in affirming the judgment of the trial court on the grounds (1) that Petitioner failed to adequately preserve its alleged error and (2) that a consideration of Petitioner's points on the merits relating to such alleged error leads to the conclusion that the trial court did not err in refusing to allow recovery as separate items of damage the loss of profits sustained by Petitioner's business, the costs incurred in readapting Petitioner's remainder property, or the moving costs incurred by Petitioner, all allegedly arising as the result of the condemnation of a portion of Petitioner's property?

STATEMENT

Respondents, the State of Texas and Harris County, by this suit in the County Civil Court at Law No. 1 of Harris County, Texas (Tr. p. 3), have acquired by the right of eminent domain, for highway purposes, two tracts of land, with improvements thereon, belonging to Petitioner, Pilgrim Equipment Company of Houston. The first tract, described as Tract 311, and being a part of Lots 11, 12, 13 and 14 of Stoeckli Place, an addition to the City of Houston, Harris County, Texas, consists of 4,918 square feet of land, after the taking of which Petitioner continued to enjoy the use of a remainder tract consisting of 8,268 square feet of land (S.F. p. 352). The second tract, described as Tract 335, and being a part of Lots 6 and 7 of the said Stoeckli Place Addition, consists of 3,229 square feet of land, after the taking of which Petitioner continued to enjoy the use of a remainder tract consisting of 6,258 square feet of land (S.F. p. 352).

Both properties from which the two tracts in question have been acquired, for some years prior to and at the time of taking in this cause, had been used by Petitioner as a laundry and dry cleaning establishment. Respondents have acquired the two tracts in question for use in the eventual construction of the easterly extension of a freeway installation known as the Southwest Freeway, or U.S. 59, within the City of Houston.

At page 8 of Petitioner's Petition For Writ of Certiorari, it is stated that "(T)he project was largely financed by Federal Highway Trust Funds." This is an incorrect statement. The cost of the right of way for this project is being borne entirely by funds of Harris County, with one-half of such cost to be reimbursed by the State of Texas. There may be plans for the use of federal funds in the construction of the freeway facility itself; however, the record in nowise reflects the past use of federal funds on this project to-date or the planned use of such funds in the future.

Proceedings before the Special Commissioners were regular and in conformity with the statutes and Rules of Civil Procedure. Objections were duly filed by Petitioner to the Award of the Commissioners and the matter became a cause pending in the County Civil Court at Law (Tr. pp. 16 and 38). The parties stipulated to the regularity of all prior proceedings and the date of taking by Respondents was established as June 10, 1969 (Tr. p. 67). Trial by jury before the Honorable Charles C. Castles, Judge of the County Civil Court at Law No. 1, was had commencing on the 28th day of September, 1970 (S.F. p. 2).

The cause was submitted to the jury upon special issues (Tr. p. 68), and in response to the verdict of the jury,

judgment (Tr. p. 67) was entered December 1, 1970, awarding to Respondents the tracts sought to be condemned and to Petitioner the sum of $99,166.00, for the value of the two tracts and for the diminution in value to Petitioner's two remainder tracts. Additionally, the judgment ordered that inasmuch as the initial offer made by Respondents to Petitioner exceeded the verdict of the jury, Petitioner pay the costs of the proceedings before the Special Commissioners and of those in the Trial Court in accordance with Texas law (Art. 3267, V.A.C.S.), and further ordered that Petitioner remit to Respondents the sum of $45,834.00, plus interest from the date of judgment, said sum being that amount by which the Award of the Special Commissioners in the amount of $145,000.00, exceeded the verdict of the jury, Petitioner having earlier withdrawn said Award in full (Tr. p. 25). Petitioner's Motion for New Trial was duly overruled on March 26, 1971, and an appeal was taken to the Court of Civil Appeals, Houston, First Supreme Judicial District of the State of Texas.

From an adverse judgment of the Court of Civil Appeals rendered and filed on November 4, 1971, the opinion of which is set out in full in Appendix "A" hereto, infra, page A-3, Petitioner filed an Application for Writ of Error in the Supreme Court of Texas. That Court by order dated April 26, 1972, a copy of which is set out in Appendix "A", infra, page A-1, refused Petitioner's Application as presenting no error requiring reversal of the judgment of the Court of Civil Appeals. The Supreme Court of Texas further overruled Petitioner's motion for rehearing by order dated May 24, 1972, a copy of which is set out in Appendix "A," infra, A-2. Thereafter, Petitioner filed its Petition for Writ of Certiorari in this Court.

It is respectfully submitted that the verdict and judgment of the Trial Court, the judgment of the Court of Civil Appeals, Houston, First Supreme Judicial District of the State of Texas, and the action of the Supreme Court of Texas on Petitioner's Application for Writ of Error, were proper and correct under the evidence and under both Texas statutory and constitutional law, and were in no way violative of any federal constitutional guarantee enjoyed by Petitioner; therefore, Petitioner's Application for a Writ of Certiorari should be refused by the Supreme Court of the United States.

REASONS FOR DENYING THE WRIT

It should be noted at the outset that it is not without some significance that Petitioner in its Application has been unable to cite to the Supreme Court any federal case authority supporting its position that its federally guaranteed constitutional rights embodied in 28 U.S.C.A. Const. Amend. V and 28 U.S.C.A. Const. Amend. XIV, Sec. 1, have in anyway been violated by the actions of the Houston Court of Civil Appeals and/or the Texas Supreme Court.

In substance, by the five questions presented by Petitioner for review, as set out at pages 3 and 4 of its Petition for a Writ of Certiorari, Petitioner complains of its inability to recover as separate items of damage (1) its moving costs allegedly caused by the partial taking of its property; (2) its costs of readapting its remainder property for continued use as a laundry and dry cleaning plant; and (3) its loss of profits allegedly suffered by reason of the partial taking.

PETITIONER'S QUESTION 1

With regard to Question 1 posed by Petitioner in its brief and its argument relating thereto that the Court of Civil Appeals erred in holding that "the question of adequate compensation was submitted to the jury," a contention which was essentially raised by Petitioner in its brief before the Houston Court of Civil Appeals, that Court declared:

> "By Point No. 1 appellant contends that the judgment based on the jury verdict did not allow appellant just and adequate compensation required by the Constitutions of the United States and the State of Texas. The Constitution of the United States, Amendment V, requires payment of 'just' compensation for property taken for public use. The Constitution of the State of Texas, Art. 1, Sec. 17, requires 'adequate' compensation for property 'taken, damaged or destroyed for or applied to public use.'
>
> "The trial court has entered judgment for appellant in the amount found by the jury in answer to issues submitted in the language suggested by State v. Carpenter, 89 S.W.2d 194 (Tex. 1936). The question of 'adequate compensation' was submitted to the jury. Brunson v. State, 444 S.W.2d 598 (Tex. 1969).
>
> "Since the answers made to these issues are supported by credible evidence, this court cannot substitute its opinion of the value of the property for that of the jury. By this point appellant does not present the question that the answers are contrary to the great weight and preponderance of the evidence. *Point No. 1 is too general to constitute a basis for the reversal of the judgment.* If the judgment is in fact inadequate, that result must have followed from the error of the trial court refusing to admit

> competent testimony offered at the trial; from the error of the trial court in manner of submitting the case to the jury; from the failure of the jury to answer the issues submitted in accordance with the weight and preponderance of the evidence; or from some such specific matter. It is appellant's burden to determine the specific matter which he contends constituted error and probably resulted in the rendition of an improper judgment. This matter must then be presented in accordance with the procedural rules established by law or adopted by the Supreme Court to govern the trial and appeal of civil cases in this state. Art. 3266, V.A.C.S.; Hale v. Lavaca County Flood Control Dist., 344 S.W.2d 245 (Tex. Civ. App.—Houston 1961); Ingram v. Nueces County, 365 S.W.2d 838 (Tex. Civ. App.—San Antonio 1963)." (Emphasis supplied)

Aside from the procedural infirmity of Petitioner's point as indicated by the Court of Civil Appeals, there can be little doubt from a review of the issues which were submitted to the jury, that Petitioner was afforded the fullest guarantee of adequate compensation as required by the constitutional amendments to which Petitioner alludes.

State v. Carpenter, supra, decided by the Texas Supreme Court, is the landmark case in Texas condemnation law and since it was decided, has been and is followed almost without exception by Texas courts in the arrival at "adequate" or "just" compensation for the taking of private property for public purposes. By the issues submitted to the jury by the trial court below, which as the Court of Civil Appeals pointed out were in the language suggested by *State v. Carpenter*, the jury was called upon to determine (1) the value of the part of Petitioner's property that was taken; (2) the value of Petitioner's remainder

property before the taking; and (3) the value of Petitioner's property after the taking. Pursuant to the jury's answers Petitioner recovered the amount assessed by the jury as being the value of the part taken plus the difference in value between Petitioner's remainder property before and after the taking.

That this submission of the case follows the well established pattern for guaranteeing "just compensation" in a partial taking of private property for public use is evidenced by the following from 4A Nichols on Eminent Domain 14-49, Sec. 14.21:

> ". . . the rule is well settled, that when part of a tract of land is taken for public use by eminent domain, just compensation to which the owner is entitled by the constitution includes damages to the remainder of the tract which resulted from the taking, as well as the value of the land taken." See U. S. Supreme Court cases cited in footnote 2 under Sec. 14.2 beginning with *Bauman v. Ross*, 167 U.S. 548, 17 S.Ct. 966 (1897) and cases cited in footnote 2 under Sec. 14.23 beginning with *Sharp v. United States*, 191 U.S. 341, 24 S.Ct. 114 (1903).

In the light of the above well settled rule and the manner of submission of this case in the trial court below, Petitioner's Question 1 should be answered in the negative.

PETITIONER'S QUESTIONS 2 AND 3

By its Questions 2 and 3, and argument relating respectively to each, Petitioner complains that the Court of Civil Appeals erred "by not reversing and remanding the judgment of the trial court on account of the error committed by said court in refusing to allow the introduc-

tion of evidence by the defendant (Petitioner)" as to moving costs (Question 2) and the cost of readapting Petitioner's remainder property after the taking (Question 3).

These particular complaints were not raised before the Houston Court of Civil Appeals and that Court, therefore, was not given the opportunity to pass on these particular alleged errors.

Of the nine points of error presented to the Houston Court of Civil Appeals, the only points relating to moving costs and costs of readapting the Petitioner's remainder property which Petitioner presented to the Court of Civil Appeals were its Points IV and VI in its Brief on appeal to that Court. By its Point IV before the Court of Civil Appeals Petitioner complained that it "should recover its moving cost caused by the taking of a part of its property by Appellees through condemnation, therefore, the trial court erred in rendering the judgment herein." By its Point VI before the Court of Civil Appeals, Petitioner complained that it "should recover the cost of readapting the remainder of its property for continued use thereof as a laundry and dry cleaning plant caused by the taking of a part of its property by the Appellees in condemnation, therefore, the trial court erred in rendering the judgment herein."

By such Points before the Court of Civil Appeals, Petitioner in reality complained of its inability to recover as separate items of damage the costs it incurred in the moving of its machinery, equipment and other personal property, and those it incurred in readapting its remainder property. As to these points the Houston Court of Civil Appeals rightfully declared that "(N)either of these points complains that the (trial)court erred in admitting evidence by appellant . . ."

Of error allegedly committed by a trial court which was not raised by an appellant in the Court of Civil Appeals, the Texas Supreme Court in *Harris v. Windsor*, 294 S.W.2d 798 (Tex. Sup. Ct. 1956), declared:

> ". . . *The point was not raised* in the trial court, *in petitioner's brief as appellant in the Court of Civil Appeals*, or in his motion for rehearing in that court. It is presented for the first time in this court, *and cannot, therefore, be considered.* Rule 469(c), Texas Rules of Civil Procedure; Edwards v. Strong, 147 Tex. 155, 213 S.W.2d 979; East Texas Motor Freight Lines v. Loftis, 148 Tex. 242, 223 S.W.2d 613."

In passing on a similar situation, the United States Supreme Court in *Husty v. United States*, 282 U.S. 694, 51 S.Ct. 240 (1931), declared:

> "In the course of the hearing on the motion, questions by petitioners seeking to establish the name and identity of the officer's informant were excluded. Petitioners ask review of these rulings on the evidence, but we do not consider them, since they were not assigned as error on the appeal to the Court of Appeals, and it does not appear that they were presented or passed upon there. Duignan v. United States, 274 U.S. 195, 200, 47 S.Ct. 566, 71 L.Ed. 996."

In light of the above and foregoing Petitioner's Questions 2 and 3 should be answered in the negative.

PETITIONER'S QUESTIONS 4 AND 5

By Petitioner's Questions 4 and 5 and the respective arguments relating thereto, Petitioner basically complains that the Court of Civil Appeals erred in holding that the

trial court did not err in refusing to allow recovery as separate items of damage, the loss of profits sustained by Petitioner's business, the moving costs and the costs of readapting its remainder, all allegedly incurred by reason of the condemnation of a portion of Petitioner's property.

With regard to this complaint, the Court of Civil Appeals in its opinion declared:

> "Appellant contends that the trial court erred in rendering the judgment herein because appellant was entitled to recover (1) damages for the loss of profits suffered by reason of the partial taking; (2) the cost of readapting the remainder of its property for continued use as a laundry and dry cleaning plant; and (3) the moving costs caused by the partial taking.
>
> "These points of error are stated to be based on Assignments of Error Nos. 2, 3, 5, and 13. The points are too general to comply with the briefing rules. Rule 418, T.R.C.P. Neither of the points complains that the court erred in admitting evidence offered by appellant with improper qualifications, nor do they complain that the trial court erred in refusing to submit properly requested issues. The points are germane to the assignments of error only in the sense that the matters complained of in the assignments of error made it impossible for appellant to secure jury findings on which to base a judgment for the specific additional damages he contends he was entitled to receive under the Constitutions of the United States and the State of Texas. *These points were not specifically presented to the trial court by the motion for new trial, and this court is not authorized to consider them.* Wagner v. Foster, 341 S.W.2d 887 (Tex. 1960); Wood v. State, 434 S.W.2d 149 (Tex. Civ. App.—Corpus Christi 1968); Daniels v.

> Daniels, 414 S.W.2d 207 (Tex. Civ. App.—Amarilio 1967); Baker v. Sturgeon, 361 S.W.2d 610 (Tex. Civ. App.—Texarkana 1962); City of Carrollton v. Rawlins, 291 S.W.2d 955 (Tex. Civ. App.—Eastland 1956, error ref.). (Emphasis added)

Of the failure of a party to preserve alleged error in a state trial court by proper assignment or otherwise, the United States Supreme Court in the case of *Michel v. State of Louisiana*, 350 U.S. 91, 76 S.Ct. 158 (1955), declared:

> "Petitioners' contention was not raised below, and we do not believe it has been properly put in issue, Pennsylvania R. Co. v. Illinois Brick Co., 297 U.S. 447, 463, 56 S.Ct. 556, 561, 80 L.Ed. 796. If such an allegation had been presented and preserved, and found support in the record, we might have a very different case here. See Rogers v. State of Alabama, 192 U.S. 226, 24 S.Ct. 275, 48 L.Ed. 417." See also Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228 (1958); Bullen v. Wisconsin, 240 U.S. 625, 36 S.Ct. 473 (1916); 14 Cyc. of Fed. Proc., 3rd Ed. 372, Sec. 67.83.

In addition to the foregoing compelling procedural reasons which preclude Petitioner from prevailing on the points in question on this appeal, the Houston Court of Civil Appeals further concluded that:

> "A consideration of appellant's points on the merits leads to the conclusion that the trial court did not err in refusing to allow recovery as separate items of damage the loss of profits sustained by appellant's business, or the moving costs incurred by appellant, as the result of the condemnation of a portion of appellant's property."

LOSS OF PROFITS

Petitioner was not entitled to recover as a separate item of damages any loss of profits allegedly arising by reason of the condemnation herein, inasmuch as such loss under Texas law can only be, and was, considered by the jury insofar as it affects Petitioner's remainder property for the use to which it was adapted and being put.

In overruling the objection made by Respondents' attorney to the initial offer and introduction of evidence as to Petitioner's loss of profits allegedly occurring by reason of this condemnation, the trial court significantly instructed the jury as follows:

> "Alright, the objection is overruled, subject however, to these instructions for the Jury. Any testimony of this witness or any other witness pertaining to any profits, if any, or losses, if any, in connection with the operation of the laundry business at or on the subject property, is admitted for the consideration of the Jury and not to show, not as evidence, tending to sustain such profits, if any, or losses, if any, as a separate item of damages, *but is admitted as affecting the market value, if it does, of the remainder of the land and improvements on the subject property after the taking* for the use to which that remainder was adapted and was being put, and for that purpose only. Subject to those instructions, the testimony may be admitted." (Emphasis added) (S.F. 107)

To a subsequent objection made to Petitioner's further showing of additional losses of profit, the Court, in again overruling such objection, declared:

> *"I'll admit the testimony* for the Jury's consideration, not as a separate item of damages, but *for*

whatever it is worth, if anything, as affecting the market value of the remaining land and improvements for the uses to which it was adapted and were being put on the subject property.

"For that purpose, and for that purpose only, you may testify only to what I have said. If you can limit your testimony to that, we'll admit it." (Emphasis added) (S.F. 339)

From the foregoing, it is clear that the trial court permitted Petitioner to show loss of profits (which Petitioner did in fact do following each of the Court's rulings quoted above—See S.F. pp. 107, 339) for the purpose of the jury's consideration in determining the market value of the remainder after the taking.

The Texas rule regarding lost profits is stated as follows in *Reilly v. State*, 382 S.W.2d 116 (Tex. Civ. App. 1964, ref. n.r.e.), a case highly similar to this one in that it involved a partial taking:

"Under the Texas decisions income or profits from a business are admissible in evidence in condemnation cases in only two situations: (1) In those cases where the landowner's business has been temporarily interrupted because of a denial of access the landowner can recover his loss of profits as an element of damage. Hart. Bros. v. Dallas County, Tex. Com. App., 279 S.W. 1111, City of LaGrange v. Pierratt, 142 Tex. 175 S.W. 2d 243, Gandy v. State, Tex. Civ. App., 293 S.W.2d 534. (2) In those cases where only a part of the landowner's land is taken, an owner may show loss of profits as an injury to his business, not as a separate item of damage, but as affecting the market value of the remaining land and improvements for the uses to which they were adapted and were being put. City of Dallas v. Priolo, 150

Tex. 423, 242 S.W.2d 176; Milam County v. Akers, Tex. Civ. App., 181 S.W.2d 719."

The taking of Petitioner's property, of course, falls into the second of the two situations as set forth by the Court in *Reilly v. State*, above.

Of the special issue regarding lost profits which Petitioner requested the trial court to submit to the jury, the Houston Court of Civil Appeals below correctly declared:

> "The requested issue was not a proper inquiry. It does not restrict the jury to a finding of profits lost by reason of a temporary disruption of its business. It was appellant's contention that by reason of the taking the property was no longer suitable for the use to which it had been devoted prior to the taking. Evidence of losses caused by permanent injury to the business was before the jury. Such a loss cannot be recovered as an item of damage separate from that resulting from the depreciation in value of the remainder. State v. Zaruba, 418 S.W.2d 499 (Tex. 1967); City of Dallas v. Priolo, 242 S.W.2d 176 (Tex. 1951); Huckabee v. State, 431 S.W.2d 927 (Tex. Civ. App.—Beaumont 1968, writ ref. n.r.e.); Reilly v. State of Texas, 382 S.W.2d 116 (Tex. Civ. App.—San Antonio 1964, ref. n.r.e.)."

MOVING EXPENSES

With regard to Petitioner's attempt to recover moving expenses incurred in the move of its business operations from the location of the property of which a part was condemned to another location in the City of Houston, Respondents had instituted suit in condemnation by the filing of their Plaintiff's Original Petition on February 25, 1969 (Tr. 9). At such time there was no Texas statutory or judicially decided law under and by which Petitioner

was entitled to reimbursement for such moving expenses. In fact the case law clearly prohibited any such reimbursement, as exemplified by the case of *State v. Vaughan*, 319 S.W.2d 349 (Tex. Civ. App. 1959, no writ history), in which it is declared:

> *"The defendants claimed and offered evidence to show expenses incurred and losses sustained in removing furniture and fixtures from the property.* It may be noted that such furniture and fixtures were not being condemned. In Herndon v. Housing Authority of City of Dallas, Tex. Civ. App., 261 S.W.2d 221, 233, er. ref., the court used language appropriate here: '* * * *it is only the real estate which is being taken, not the business. The owner may keep his business and continue to operate it at a different location.*' Here *the defendants of course could keep the furniture and fixtures and use them at other locations.* The expenses incurred and losses sustained were purely incidental and consequential to the taking of the property and *were not recoverable as damages for the taking of the property.* Evidence as to these matters was not proper and should not have been admitted." (Emphasis added)

Subsequent to the institution of this suit on February 25, 1969, the Texas Legislature passed two statutes, Section 7 of Article 3265 and Article 6674-n (renumbered as Article 3266b).

Section 7 of Article 3265, which became effective September 1, 1969, which was subsequent in time to the institution of this suit (February 25, 1969) and to the time this matter became a cause pending in court by the Petitioner's filing of its objections and exceptions to the award of the special commissioners on May 9, 1969 (Tr. 16), provides:

> "The owner of the land who is actually and physically displaced and permanently moves from his dwelling or place of business shall be entitled to, as a separate item of damages, the reasonable moving expenses for personal property other than machinery, equipment, or fixtures, not to exceed $500.00, when personal property is moved from a place of residence and not to exceed $5,000.00, when personal property is moved from a place of business, but the maximum distance of movement to be considered shall be fifty (50) miles. In no event shall such expenses exceed the market value of such personal property; *provided, however, that the provisions of this section shall not apply in any condemnation proceeding whether before special commissioners or the court where the owner is entitled to reimbursement for moving expenses under other existing law.*" (Emphasis added)

It is submitted that because of the effective date of the above Article, Petitioner could not avail itself of the provisions of said Article. In any event, the "other existing law" referred to in the emphasized proviso above would preclude Petitioner from the applicability of such statute.

Such "other existing law" at the time Section 7, Article 3265 became effective (September 1, 1969), could only have been then Article 6674n-4 (subsequently renumbered as Article 3266b), which had earlier become effective on April 2, 1969, which was, however, still subsequent in time to the institution of this suit on February 25, 1969.

Before its amendment in 1971, long after this suit had been concluded, said Article 6674n-4 (now 3266b) provided as follows:

"Section 1. When in the acquisition of right of way for any highway designated by the State Highway Commission as a part of the State Highway System it becomes necessary that any individual, family, property of a business concern, farm or ranch operation or non-profit organization be displaced they may be paid their moving expenses, relocation payments, be provided financial assistance to acquire replacement housing, or allowed rental supplements and compensated for expenses incidental to the transfer of property to the state all of which payments or expenditures are hereby declared to be an expense and cost of right of way acquisition. *The State Highway Commission shall formulate the rules and regulations necessary to carry out the provisions of this section and shall not authorize payments or expenditures in excess of those authorized by the Federal Highway Relocation Assistance Program.*

"Sec. 2. *The State Highway Commission shall provide a relocation advisory service for all* individuals, families, *business concerns,* farm and ranch operations and non-profit organizations which shall be compatible with the Federal Highway Relocation Advisory Program.

"Sec. 3. *The Comptroller of Public Accounts is hereby authorized to issue a State Warrant on the appropriate account for all relocation costs* and the costs of administering the relocation assistance program. Acts 1969, 61st Leg., p. 133 ch. 45, emerg. eff. April 2, 1969." (Emphasis added)

There can be little question from a review of the foregoing statute that what the Legislature contemplated by same was to establish a new and heretofore unauthorized program under and by which reimbursement of relocation costs could be made and which program is to be handled and conducted separately and apart from the trial of con-

demnation causes, which relate only to the taking of real estate. The statute obviously was passed to provide relief to condemnees such as Petitioner in this case, whose *business operations* are displaced as a result of the necessity of acquiring their *business location* for a state highway.

That such reimbursement of relocation costs is not contemplated to form any part of the condemnation trial involving the real estate of any business concern affected, is made clear by the statute's declaration that "The State Highway Commission shall formulate the rules and regulations necessary to carry out the provisions of this section and shall not authorize payments or expenditures in excess of those authorized by the Federal Highway Relocation Assistance Program."

Also, such statements in the statute that "The State Highway Commission shall provide a relocation advisory service for all . . . business concerns . . . which shall be compatible with the Federal Highway Relocation Advisory Program," and that "The Comptroller of Public Accounts is hereby authorized to issue a State Warrant on the appropriate account for all relocation costs . . .," clearly indicate that the Legislature by said statute contemplated a program separate and apart from the procedure to be followed in condemnation cases culminating in a trial with a jury determining the fair market value of the real estate involved.

The foregoing was the basis for the declaration by the Court of Civil Appeals below that:

> ". . . These items may well constitute 'damage' to appellant, but the cost of removing the personal property does not constitute 'damage' to appellant's 'property'. Jurisdiction of this cause of action is statu-

> tory. Article 3265, V.A.C.S., prescribes 'market value' as the test of adequate compensation in condemnation proceedings. City of San Antonio v. Congregation of the Sisters of Charity of the Incarnate Word, Inc., 404 S.W.2d 333 (Tex. Civ. App.—Eastland 1966, no writ). Neither Sec. 17, Article 1 of the Constitution nor Article 3265, V.A.C.S., authorizes the County Court to entertain a cause of action for damages in a condemnation case other than such damages to 'property' as results from a taking for public use . . ."

COSTS OF READAPTING REMAINDER

In addition to the procedural infirmity of Petitioner's complaint as to its inability to recover the costs it allegedly incurred in readapting its remainder property, its position as to the recovery of these costs during the trial below and now is a classic case of a party wanting his cake and wishing to eat it too. Petitioner, by its only two witnesses, contended at the outset of the trial and throughout its progress that by reason of the condemnation of a portion of each of the buildings on the two tracts involved in this case, the remaining portions of such buildings were rendered *totally* valueless.

First, with regard to the testimony of Petitioner's witness Robertson, this witness first stated that he had no opinion as to the value of the improvements on Petitioner's property before the taking but that after the taking the improvements left on Petitioner's remainder property had *no* value (S.F. 80, 81).

Petitioner's witness Reed testified that the value of the improvements on one tract (Tract 311) before the taking was $109,965.00, and that after the taking the value of

the improvements on the remainder was "zero." (S.F. 275, 276). With regard to the other of Petitioner's tracts (Tract 335), Reed testified that the value of the improvements thereon before the taking was $6,937.00, and that after the taking the value of such improvements on the remainder was again "zero" (S.F. 304).

It is clear from the testimony of both the witnesses Robertson and Reed that Petitioner sought in the trial of this case a 100% recovery of the total value of the improvements on both of the properties involved in this condemnation. For by contending that the value of the improvements on the Tract 311 property before the taking was $109,965.00 and that the value of the improvements on the Tract 335 property before the taking was $6,937.00 and to contend that the value of such improvements on each of the said respective remainders after the taking was zero, Petitioner clearly sought a full recovery of the total value of said improvements as they existed prior to the taking.

The attempt to recover the full value of its improvements was, of course, a legitimate goal which Petitioner was entitled to attempt to achieve; but it was the maximum amount which Petitioner was entitled to attempt to recover as to its improvements.

For the trial court to have allowed Petitioner to show the cost of adapting or readapting the improvements on the remainder for a continued use of such remainders for whatever purpose, in the light of Petitioner's attempt to recover the full value of such improvements, would clearly have been to allow Petitioner to attempt to recover an amount exceeding the overall value of such improvements. This, of course, was precisely what Petitioner sought to

achieve in attempting to have its witnesses testify to the cost of installing a new boiler and a new water softener and purification system in the remainder building on Tract 311, as well as to the cost of constructing new offices in said remainder building.

In summary, for the trial court below to have allowed Petitioner to introduce costs allegedly incurred of adapting the remainder improvements, after Petitioner's witnesses had testified that such improvements were rendered valueless by the taking and that Petitioner was thereby entitled to the full value of same in the Jury's answers to the remainder before and after issues, would simply have allowed Petitioner to seek a recovery of damages greater than that to which it was entitled, to-wit, the full value of said improvements. The trial court did not, therefore, err in refusing to permit evidence of such costs and/or to submit Petitioner's requested Special Issue No. 4 and thereby permit Petitioner to seek recovery as a separate item of damages its costs of readapting its remainder property.

For all of the foregoing reasoning and authorities, Petitioner's Questions 4 and 5 should be answered in the negative and the contention raised thereby overruled.

PRAYER

Petitioner has wholly failed to show that either the trial court, the Houston Court of Civil Appeals or the Texas Supreme Court has committed any error in this cause and has further failed to show that any of its constitutional guarantees have in any way been violated.

Wherefore, Respondents pray that Petitioner's Petition for Writ of Certiorari be in all things refused.

Respectfully submitted.

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Harris County, Texas

By Edward J. Landry
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CERTIFICATE OF SERVICE

The undersigned, one of the counsel for Respondents, does hereby certify that on this 12th day of October, 1972, he did deposit in the United States mail, with sufficient postage to deliver same, two (2) true and correct copies of this Brief of Respondents, addressed to Cutrer & Jefferson, Attorneys at Law — Attention: Mr. Lewis Cutrer — 3901 Westheimer, Suite 301, Houston, Texas 77027, Attorneys for Petitioner.

EDWARD J. LANDRY
Assistant County Attorney

Edward J. Landry

APPENDIX A

IN THE

Supreme Court of Texas

April 26, 1972

No. B-3135

Pilgrim Equipment Company of Houston

vs.

The State of Texas

From Harris County
First District

Application of petitioner for writ of error to the Court of Civil Appeals for the First Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Pilgrim Equipment Company of Houston, and surety, American Employers' Insurance Company, pay all costs incurred on this application.

May 24, 1972

No. B-3135

Pilgrim Equipment Company of Houston	)	
	)	From Harris County
vs.	)	First District
The State of Texas	)	

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 3rd day of August, 1972.

GARSON R. JACKSON, Clerk

By: /s/ Eugene Cervenka, Deputy
Eugene Cervenka

Affirmed, and Opinion filed November 4, 1971.
TFC/b

NO. 15,811

PILGRIM EQUIPMENT COMPANY
OF HOUSTON, *Appellant*,

vs.

THE STATE OF TEXAS, ET AL, *Appellees*.

Appeal from County Civil Court at Law
Of Harris County

This is a condemnation case. Judgment was entered based on a jury verdict. The land owner has appealed.

Six special issues were submitted to the jury. The land was taken from two separate tracts under single ownership. The issues related to the market value of the land taken and the damage to each of the tracts resulting from the taking.

Appellant's first three points complain that the judgment did not allow appellant just or adequate compensation; that the answer made by the jury to Special Issue No. 2 was conflicting and inconsistent with its answer to Special Issue No. 1; and that the answer to Special Issue No. 2 "was not supported by a preponderance of the evidence", and therefore that the court erred in entering judgment thereon.

The second and third points are based on the seventh assignment of error in appellant's motion for new trial reading: "The Court erred in not setting aside the answers of the jury to the Special Issues since such answers were inconsistent, incompatible and in sharp conflict with one another and contrary to the preponderance of the evidence introduced."

Rule 374, T.R.C.P., provides that a ground of error not distinctly set forth in the motion for new trial shall be considered as waived.

The assignment of error is directed to the entire verdict. It does not point out the particular answers that are alleged to be in conflict or inconsistent. The alleged error brought to the attention of the trial court by the assignment was the failure to set aside the verdict, which would have required a new trial. The attention of the court was not specifically directed to the point now raised, i.e., that the answers to Special Issues 1 and 2 are conflicting and inconsistent. No conflict or inconsistency is apparent from reading the issues and the answers made thereto. Appellant's Point 2 is without merit, and cannot be considered. Garvel v. Young, 407 S.W.2d 518 (Tex. Civ. App.—Houston 1966, writ ref., n.r.e.).

Since appellant, in the Amended Motion for New Trial, failed to state that the evidence supporting the jury answer to any specific special issue was either insufficient or against the great weight of the credible evidence, this court has no jurisdiction to consider Point 3. Darryl v. Ford Motor Co., 440 S.W.2d 630 (Tex. 1969).

By Point No. 1 appellant contends that the judgment based on the jury verdict did not allow appellant just

and adequate compensation required by the Constitutions of the United States and the State of Texas. The Constitution of the United States, Amendment V, requires payment of "just" compensation for property taken for public use. The Constitution of the State of Texas, Art. 1, Sec. 17, requires "adequate" compensation for property "taken, damaged or destroyed for or applied to public use."

The trial court has entered judgment for appellant in the amount found by the jury in answer to issues submitted in the language suggested by State v. Carpenter, 89 S.W.2d 194 (Tex. 1936). The question of "adequate compensation" was submitted to the jury. Brunson v. State, 444 S.W.2d 598 (Tex. 1969).

Since the answers made to these issues are supported by credible evidence, this court cannot substitute its opinion of the value of the property for that of the jury. By this point appellant does not present the question that the answers are contrary to the great weight and preponderance of the evidence. Point No. 1 is too general to constitute a basis for the reversal of the judgment. If the judgment is in fact inadequate, that result must have followed from the error of the trial court refusing to admit competent testimony offered at the trial; from the error of the trial court in manner of submitting the case to the jury; from the failure of the jury to answer the issues submitted in accordance with the weight and preponderance of the evidence; or from some such specific matter. It is appellant's burden to determine the specific matter which he contends constituted error and probably resulted in the rendition of an improper judgment. This matter must then be presented in accordance with the

procedural rules established by law or adopted by the Supreme Court to govern the trial and appeal of civil cases in this State. Art. 3266, V.A.C.S.; Hale v. Lavaca County Flood Control Dist., 344 S.W.2d 245 (Tex. Civ. App.—Houston 1961); Ingram v. Nueces County, 365 S.W.2d 838 (Tex. Civ. App.—San Antonio 1963).

Appellant contends that the trial court erred in rendering the judgment herein because appellant was entitled to recover (1) damages for the loss of profits suffered by reason of the partial taking; (2) the cost of readapting the remainder of its property for continued use as a laundry and dry cleaning plant; and (3) the moving costs caused by the partial taking.

These points of error are stated to be based on Assignments of Error Nos. 2, 3, 5, and 13.[1] The points are too

1. "Second—The Court erred in its ruling on the Motion in Limine filed by Plaintiffs herein particularly by limiting and qualifying the evidence that the Defendants could introduce concerning moving cost and cost of readapting the remainder of their property for use as a laundry and cleaning establishment and loss of profits in the operation of their business as a result of and on account of the condemnation of a part of their property which is described in Plaintiffs' pleadings filed herein.

"Third— The Court erred in refusing to admit and/or qualifying and commenting upon the evidence introduced or to be introduced by the Defendants at the trial of this cause regarding moving cost, loss of profits, cost of adapting remainder of their property for use previously made thereof and other expenses suffered and sustained by the Defendants on account of the condemnation of their property hereunder, same being in violation of Amendment V. of the Constitution of the United States and Article 1, Section 17 of the Constitution of the State of Texas, since such items represented actual damages sustained by the Defendants on account of the condemnation of their prop-

general to comply with the briefing rules. Rule 418, T.R.C.P. Neither of the points complains that the court erred in admitting evidence offered by appellant with improper qualifications, nor do they complain that the trial court erred in refusing to submit properly requested issues. The points are germane to the assignments of error only in the sense that the matters complained of in the assignments of error made it impossible for appellant to secure jury findings on which to base a judgment for the specific additional damages he contends he was entitled to receive under the Constitutions of the United States and the State of Texas. These points were not specifically presented to the trial court by the motion for new trial, and this court is not authorized to consider them. Wagner v. Foster, 341 S.W.2d 887 (Tex. 1960); Wood v. State, 434 S.W.2d 149 (Tex. Civ. App.—Corpus Christi 1968); Daniels v. Daniels, 414 S.W.2d 207 (Tex. Civ. App.—Amarillo 1967); Baker v. Sturgeon, 361 S.W.2d 610

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erty and represented just compensation to which they were legally entitled.

"Fifth — The Court erred in refusing to submit to the Jury the Special Issues which were duly and timely presented to the Court by the Defendants concerning moving cost suffered by the Defendants and also the cost of adapting the remainder of Defendants' property so that they could continue to operate a laundry and cleaning establishment thereon and also the loss of profits sustained by said Defendants on account of such partial taking, which under the preponderance, if not all of the evidence introduced, showed that due to such partial taking the Defendants had to relocate their business at substantial cost, expense and damages.

"Thirteenth—The Court erred in signing and entering the judgment for Plaintiffs herein, same being in violation of Amendment V. of the Constitution of the United States and of Article 1, Section 17 of the Constitution of the State of Texas."

(Tex. Civ. App.—Texarkana 1962); City of Carollton v. Rawlins, 291 S.W.2d 955 (Tex. Civ. App.—Eastland 1956, error ref.).

A consideration of appellant's points on the merits leads to the conclusion that the trial court did not err in refusing to allow recovery as separate items of damages the loss of profits sustained by appellant's business, or the moving costs incurred by appellant, as the result of the condemnation of a portion of appellant's property.

As a consequence of the taking on Tract 311 the building housing appellant's laundry and dry cleaning plant was severed, about 4,900 square feet of the building being within that portion of the tract taken, leaving about 8,000 square feet on the remainder. Equipment necessary to the operation of the entire plant was located within the part taken, including the steam boiler, water softener, air conditioning equipment, and a large flat press. Obviously a new wall would be required if the operations in the plant were to continue. At the time of this trial the building itself had not been severed. However, appellant had severed the water, steam, air conditioning ducts, and electrical lines prior to trial, and had removed all personal property from the area taken. This was necessary by reason of the fact that appellee had deposited the commissioners' award in the registry of the court.

There was testimony that the highest and best use of the property on June 10, 1969, the date of taking, was the use then being made of the property, that is, use of the property as a laundry, main plant and central offices, maintenance and carpenter shop, servicing a chain of 160 retail laundry and cleaning outlets. Both tracts of land, Tract 311 and 335, served as an over-all unit in

the operation of the business. The buildings on both tracts had been adapted to a special use where every square foot served a purpose. There was other testimony by expert witnesses produced by appellee that the highest and best use for the property was for laundry and dry cleaning purposes.

Appellee permitted appellant four months after the date of the taking to remove his business operations from that portion of the building taken. The business was disrupted during this period, and to some extent thereafter. Pilgrim's president testified that the remainder was not large enough for the dry cleaning assembly line, so that this operation was transferred to the Pasadena plant. There was not enough space for the large flat work ironer and a smaller one was installed in the remainder. This equipment would not take care of the work, and there was not enough storage space in which to store both the incoming material and the completed work. The company had a smaller plant on Stella Link, which it continued to operate, but it discontinued this type work at the subject property because it was not profitable in the small scale operation. At the time of the trial he had not been able to locate a suitable property for a new plant capable of handling the flat work operations.

By the end of the four month period the adminstrative offices, the carpenter shop, parts department, the labor office and the maintenance department had been transferred to another location. These activities were operated from the same location for economic reasons and there was not sufficient room in the remainder for all of them. The closing of the assembly lines in the Almeda plant made it necessary to discontinue most of the home pick-up and delivery routes.

The operation continued at the Almeda plant in the remainder at a reduced scale until it was abandoned for all purposes except as a retail pick-up and delivery station. Appellant had 160 different retail outlets. Prior to the date of taking the Almeda plant did flat work for 75% to 80% of the outlets. Appellant acquired land at 6723 Stella Link for its new main plant. It took about eighteen months to find a desirable location, purchase it, get some zoning restrictions removed, construct a building, install the necessary equipment, and begin operations. This plant was not designed for the flat work operation. Mr. Robertson, appellant's president, testified that by reason of the condemnation in his judgment it was no longer feasible to continue to operate the Almeda plant.

Appellant was permitted to introduce testimony as to the profits and losses sustained by the Almeda plant from January, 1969, to and including May, 1970, at which time the plant was shut down except for the retail operation. Substantial profits were shown for each month prior to the date of taking, and substantial losses were shown for each month after the date of taking. The trial court instructed the jury that the evidence concerning the profits and losses was admitted not as evidence tending to sustain such profits or losses as a separate item of damages, but that such evidence was admitted "as affecting the market value, if it does, of the remainder of the land and improvements on the subject property after the taking for the uses to which that remainder was adapted and was being put, and for that purpose only." Appellant made no objection to this instruction, and cannot now be heard to complain of this action of the court. Substantially the same instruction was included in the court's charge. If

objections were made to the court's charge, they were not included in the transcript.

Appellant's Requested Issue No. 1, refused by the court, reads:

> "From a preponderance of the evidence, what do you find was the amount of the loss of profits, if any, sustained by Pilgrim Equipment Company of Houston on account of the condemnation by the State of Texas and County of Harris of Pilgrim's property known as Tracts Numbers 311 and 335?"

While appellant has no point complaining of the failure of the trial court to submit this special issue, under his point charging the court with error in entering the judgment herein because of the failure to allow damages by reason of lost profits, he points to the action of the court in limiting the evidence as above set out and in refusing the special issue. These matters were sufficiently preserved in the motion for new trial. The claimed error in limiting the testimony was waived by appellant's failure to object to the instructions limiting the purpose for which the jury could consider the evidence relating to profits and losses at the various times such an instruction was given. King v. Robert, 84 S.W.2d 718 (Tex. 1935); Texas-Mexican Ry. Co. v. Creekmore, 204 S.W. 682 (Tex. Civ. App.—San Antonio 1918, err. dism'd); Mayberry v. Campbell, 356 S.W.2d 827 (Tex. Civ. App.—Amarillo 1962, writ ref., n.r.e.).

The requested issue was not a proper inquiry. It does not restrict the jury to a finding of profits lost by reason of a temporary disruption of its business. It was appellant's contention that by reason of the taking the property was

no longer suitable for the use to which it had been devoted prior to the taking. Evidence of losses caused by permanent injury to the business was before the jury. Such a loss cannot be recovered as an item of damage separate from that resulting from the depreciation in value of the remainder. State v. Zaruba, 418 S.W.2d 499 (Tex. 1967); City of Dallas v. Priolo, 242 S.W.2d 176 (Tex. 1951); Huckabee v. States, 431 S.W.2d 927 (Tex. Civ. App.—Beaumont 1968, writ ref., n.r.e.); Reilly v. State of Texas, 382 S.W.2d 116 (Tex. Civ. App.—San Antonio 1964, ref., n.r.e.).

The refusal of appellant's special issue designed to establish the expense of removing the personal property from the property taken to other property belonging to appellant was not error. These expenses might well result in a temporary loss of profit for the business. Unless compensation can be recovered for these items in that context (a question we do not decide here), it cannot be recovered in this action. These special items of damage were not specially plead, consequently it was not shown that the damage sought was within the jurisdiction of the County Court at Law in which the case was tried. These items may well constitute "damage" to appellant, but the cost of removing the personal property does not constitute "damage" to appellant's "property". Jurisdiction of this cause of action is statutory. Article 3265, V.A.C.S., prescribes "market value" as the test of adequate compensation in condemnation proceedings. City of San Antonio v. Congregation of the Sisters of Charity of the Incarnate Word., Inc., 404 S.W.2d 333 (Tex. Civ. App.—Eastland 1966, no writ). Neither Sec. 17, Article 1 of the Constitution, nor Article 3265, V.A.C.S., authorizes the County Court to entertain a cause of action for damages in a

condemnation case other than such damage to "property" as results from a taking for public use, subject to the exception contained in Sec. 7 of Art. 3265 specifically authorizing the recovery of moving expenses where the owner of land is "actually and physically displaced and permanently moves from . . . his place of business and limiting such recovery to the reasonable expense of moving the property, not to exceed $5,000.00 or the market value of such property." Appellant failed to request issues necessary for a recovery under Sec. 7. State v. Carpenter, 89 S.W.2d 979 (Tex. 1936); Kennedy v. City of Dallas, 201 S.W.2d 840 (Tex. Civ. App.—Dallas 1947, writ ref.); State v. Vaughan, 319 S.W.2d 349 (Tex. Civ. App. —Austin 1959, no writ).

Appellant's Point 7 does not present error. At several places in the record testimony was presented without objection that appellant had listed the remainder property for sale with the wall reconstructed on the south remainder. When a witness was asked "how much the real estate dealer was trying to get for the property," an objection was promptly sustained.

Appellant contends that the case must be reversed by reason of certain statements made by appellees' attorney during jury argument, contending that such argument was so prejudicial that its effect could not have been removed by an instruction from the trial judge. The attorney asked the jury "to be just as fair to the taxpayers of Harris County and the State of Texas as to the stockholders of Pilgrim Equipment Company." The arguments of counsel were not transcribed and appellees do not concede that this statement was made. An informal bill of exception is found in the statement of facts.

A review of the entire record leads us to the conclusion that no reversible error was shown. It is conceded that no objection was made at the time and that the trial judge was not requested to instruct the jury to disregard the statement. We do not think that the record demonstrates that such argument resulted in the rendition of an improper verdict or judgment. Kittrell v. State, 382 S.W.2d 273 (Tex. Civ. App.—Dallas 1964, ref., n.r.e.); Camp v. Commissioners Court of El Paso County, 279 S.W.2d 927 (Tex. Civ. App.—El Paso 1955, ref., n.r.e.).

Appellant complains of the action of the trial court in sustaining appellees' motion in limine to prohibit appellants' counsel from showing that the witness Hughes had earlier been employed by appellees to appraise appellant's property and that he was a witness for appellees at the Special Commissioners' hearing. Hughes was subpoenaed as a witness by appellant, but was not called to testify. There was no error in sustaining the motion in limine. State v. Biggers, 360 S.W.2d 516 (Tex. 1962).

The judgment is affirmed.

/s/ Tom F. Coleman

Associate Justice

Judgment rendered and opinion filed November 4, 1971.

NOV 30 1972
MICHAEL RODAK, JR., CLERK

NO. 72-299

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

PILGRIM EQUIPMENT COMPANY OF HOUSTON,
Petitioner

v.

THE STATE OF TEXAS, ET AL,
Respondents

PETITION FOR REHEARING ON ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, HOUSTON, 1st SUPREME JUDICIAL DISTRICT OF TEXAS

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INDEX

	Page
Questions Presented for Review and Related Arguments	3-7
Question 1	3
Questions 2 and 3 Grouped	4-5
Questions 4 and 5 Grouped	5-6
Petitioner's Reply to Respondents' Arguments Related to:	
Loss of Profits	8
Moving Expenses	8-9
Costs of Readapting the Remainder	10-11

LIST OF AUTHORITIES

CASES	Page
Reilly v. State, 382 S.W.2d 116 (Tex. Civ. App., ref. n.r.e.) (1964)	8
State v. Waco Independent School District, 364 S.W.2d 263 (writ ref., n.r.e.)	8
United States v. General Motors Corp., 65 S.Ct. 357, 323 U.S. 373	1, 2
CONSTITUTION	
28 U.S.C.A. Const. Amend. V	3, 9
STATUTES AND RULES	
Article 3265, V.A.C.S.	9
Article 3266b, V.A.C.S.	9
Article 6674n-4, V.A.C.S.	9
Rule 418, T.R.C.P.	5, 7
Rule 469(c), T.R.C.P.	5

NO. 72-299

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

PILGRIM EQUIPMENT COMPANY OF HOUSTON,
Petitioner

v.

THE STATE OF TEXAS, ET AL.,
Respondents

PETITION FOR REHEARING ON ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, HOUSTON, 1st SUPREME JUDICIAL DISTRICT OF TEXAS

To The Honorable Supreme Court Of The United States:

Petitioner now presents this timely Petition for Rehearing on this Court's order denying a Writ of Certiorari to the Court of Civil Appeals, Houston, 1st Supreme Judicial District of Texas. We would urge to this Court that our cause be reconsidered. We would show that our cause is not plagued with procedural infirmities, and further, that under the decision in *United States v. General Motors Corp.*, 65 S.Ct. 357, 323 U.S. 373, it appears that Peti-

tioner's offer of evidence relative to moving costs and costs of readapting the remainder should have at least been allowed to be introduced before the jury for their use in determining "market value" of the remainder immediately after the taking. The Court in the above case has stated that the condemnation of a short-term leasehold estate, which is actually carved out of a long-term leasehold estate, is special. We would urge that this is no more a hardship than that which is occasioned by the condemnation of the fee simple interest. This risk should not be placed on the shoulders of one landowner, but, rather, should be carried by the general public.

Petitioner is not asking this Honorable Court to substitute its opinion of the value of our property for that of the jury. On the contrary, we are before you now to urge that the scope of "just compensation for private lands taken for public use" be defined so as to encompass all damages sustained by the landowner as a result of such condemnation. In *United States v. General Motors Corp.*, 65 S.Ct. 357, 323 U.S. 373, the Court has expanded the meaning of the term "property" as contained in the Federal Constitution to encompass the group of rights inhering in a citizen's relation to the physical thing, as the right to possess, use and dispose of it. Why shouldn't this "meaning" be applied in the area of condemnation by a partial taking of the "fee simple" interest? We would urge that this is the proper standard dictated by the Constitution of the United States for all condemnation cases.

Further, at the outset let us answer Respondents' charge that our statement about Federal financing was incorrect. We feel as though Respondents have, through carefully

chosen words, left the Court with the impression that there was an absence of Federal financing with respect to this highway project. At the time of trial, there was not any offer of evidence tending to show actual Federal expenditures on this highway project; however, the Condemnor's Petition for Condemnation stated that such right-of-way was being acquired as a link in U. S. Highway 59. Furthermore, signs appeared on the Condemnee's property which stated that such project was backed by Federal Highway Trust Funds in the amount of $4,700,000.00.

QUESTIONS PRESENTED FOR REVIEW

QUESTION 1 STATED:

Did the Court of Civil Appeals err in holding that the question of adequate compensation was submitted to the jury as required by 28 USCA Constitutional Amendment V, and 28 USCA Const. Amend. XIV, Section 1?

With respect to this question, the Respondents have charged that such a position is plagued with procedural infirmities. We would urge to this Honorable Court that our basis for appeal is procedurally strong. Respondents have quoted the Court of Civil Appeals in pointing out that we have failed to show how the judgment was inadequate. Your Petitioner has perfected this Appeal on the general ground that it has been denied "just compensation" for a partial taking of its land through condemnation; and, further, that this denial was effected through the trial court's refusing to admit evidence as to moving costs, costs of readapting the remainder, and its qualifying of our introduction of evidence concerning loss of profits.

We fail to see how it can be said that these errors were not brought to the attention of the trial court through our Amended Motion for New Trial, Assignments of Error 2, 3, 5 and 13, as set out verbatim in footnote 1, page 12, of our Petition for Writ of Certiorari. With respect to moving costs and costs of readapting the remainder, a Bill of Exception was made at the time of trial (S.F. 122-153). When the Court sustained the objection to this offer, we promptly excepted to the Court's ruling (S.F. 122). With respect to our offer of evidence on loss of profits, this evidence was not offered for any limited purpose and such limitation was only placed on it by the Court in response to an objection raised by the attorney for Respondents.

QUESTIONS 2 AND 3 GROUPED AND STATED:

QUESTION 2:

Did the Court of Civil Appeals err by not reversing and remanding the judgment of the trial court on account of the error committed by said court in refusing to allow the introduction of evidence by the Defendant (Petitioner) as to moving costs, such costs being a necessary item of damage in a judgment rendering "just" or "adequate" compensation to a landowner as a result of a partial taking for public use through eminent domain, as required by 28 USCA Const. Amend. V?

QUESTION 3:

Did the Court of Civil Appeals err by not reversing and remanding the judgment of the trial court on account of the error committed by said court in re-

fusing to allow the introduction of evidence by the Defendant (Petitioner) as to the costs of readapting the remainder after the taking, such costs being a necessary item of damage in a judgment rendering "just" or "adequate" compensation to a landowner as a result of a partial taking for public use through eminent domain, as required by 28 USCA Const. Amend. V?

With respect to Respondents' charge that Petitioner's questions 2 and 3 were not presented to the Court of Civil Appeals for consideration, we believe that this is only a resort to semantics. Petitioner contends that Points of Error I, IV and VI, as presented to the Court of Civil Appeals, raised the question of "just compensation" and adequately apprised the Court as to our contentions respecting the submission of this question, i.e., the exclusion of our evidence relative to moving costs (Question 2) and costs of readapting the remainder (Question 3). Rule 469c T.R.C.P. only required that such points be stated in short form without argument and be germane to some assignment of error in the motion for new trial in the trial court. Petitioner contends that Points of Error I, IV and VI are germane to assignments of error 2, 3, 5, and 13, as presented to the trial court in its Amended Motion for New Trial. Under Rule 418, T.R.C.P., it is not necessary that a "point" be complete within itself, in the sense that it must, on its face, show that the matter complained of presents reversible error.

QUESTIONS 4 AND 5 GROUPED AND STATED:

QUESTION 4: Did the Court of Civil Appeals err in holding that the trial court did not err in refusing

to allow recovery as separate items of damage, the loss of profit sustained by Petitioner's business and moving costs and costs of readapting the remainder incurred by Petitioner as a result of the condemnation of a portion of its property?

QUESTION 5: Did the Court of Civil Appeals err in holding that Points IV, V and VI in Appellant's brief wherein Appellant contended that it should recover its moving costs and costs of readapting the remainder of its property for continued use thereof as a laundry and dry-cleaning plant and also its loss of profits, all caused by a partial taking of its property by Appellee through condemnation, were points which were not specially presented to the trial court by the Motion for New Trial, and this Court is not authorized to consider them?

In attempting to show why the above two questions should be answered in the negative, Respondent has quoted the Court of Civil Appeals, as follows:

> "These points of error are stated to be based on Assignments of Error 2, 3, 5, and 13. The points are too general to comply with the briefing rules. Rule 418 T.R.C.P. Neither of the points complains that the Court erred in admitting evidence offered by Appellant with proper qualifications, nor do they complain that the trial court erred in refusing to submit properly requested issues. The points are germane to the Assignments of Error only in the sense that the matters complained of in the Assignments of Error made it impossible for Appellant to secure jury findings on which to base a judgment for the specific additional damage he contends he was entitled to receive under the Constitutions of the

> United States and the State of Texas. These points were not specifically presented to the trial court by the Motion for New Trial, and this Court is not authorized to consider them." (Authorities cited)

In reply to this argument, Petitioner would point out that by the Court of Civil Appeals' own admission, our points were germane to the Assignments of Error 2, 3, 5, and 13, as contained in our Amended Motion for New Trial. Rule 418(c) T.R.C.P. only requires that a point of error be germane to some assignment of error in the motion for new trial. Also, after a close reading of the above-mentioned assignments of error, (Petition for Writ of Certiorari, P. 12) how can it be said that such do not draw the Court's attention to specific errors committed in the trial court? We objected to the trial court's refusal to admit evidence on the costs of moving and costs of readapting the remainder (Tr. 122). This point was preserved at the time of trial, timely presented in our Amended Motion for New Trial, and raised in our Points of Error I, IV and VI before the Court of Civil Appeals.

In response to Petitioner's offer of evidence on loss of profits and an objection to such offer from Respondents, the trial court admitted our offer of such evidence for a limited purpose. If the record fails to reflect an objection on our part to this limit placed on our offer by the trial court, it is our position that such error was preserved without a formal objection. We did not offer this testimony for a limited purpose. Further, this error was presented to the trial court in our Amended Motion for New Trial (Nos. 2, 3, 5 and 13) and to the Court of Civil Appeals through Point of Error No. V.

LOSS OF PROFITS

Points of Error I and V
(Germane to Assignments of Error 2, 3, 5, 13)

As in the Waco Independent School District Case, discussed on page 25 of our Petition for Writ of Certiorari, we feel as though the present case presents a situation involving special damage for which the "market value rule" does not provide adequate compensation. These special damages should include loss of profits as well as moving costs and costs of readapting the remainder.

Respondents have cited *Reilly v. State*, 382 S.W.2d 116 (Tex. Civ. App. 1964, ref. n.r.c.) regarding loss of profits as a separate item of damages. We fail to see how the Courts of Texas can say that loss of access from one's property to the public highway system is any more "peculiar" or "special" than losing a section of your property through a partial condemnation which causes the continuation of your business on the remainder to be economically unfeasible. Our loss of profits can be limited in time so as to encompass the time in between the date of taking and the time Petitioner's business was relocated on suitable premises. In the face of such a record, these losses are real, determinable, and directly caused by this partial condemnation of Petitioner's land for a public use.

MOVING EXPENSES

Points of Error I and IV
(Germane to Assignment of Error 2, 3, 5, 13)

It is Petitioner's contention that we are entitled to recover moving expenses under the Constitutions of the

United States, the State of Texas, and Article 3265 V.A.C.S. as separate items of damage.

In Respondents' (Plaintiff's) Reply to Defendant's Amended Motion for New Trial, and in their Brief filed in the Court of Civil Appeals, they argue that if such expenses are recoverable at all, then they are only recoverable under the provisions of Article 6674n-4, V.A.C.S. Now Respondents have implied that recovery under 6674n-4, V.A.C.S., is not likely. In their Response to our Petition for Writ of Certiorari, page 16-17, Respondents have discussed the applicability of two statutes (Article 3265, Section 7, V.A.C.S. and Article 6674n-4, V.A.C.S.) which deal with the recovery of moving expenses. It is interesting to note how they first say that Section 7 of Article 3265, V.A.C.S., could not apply due to its date of enactment and then avail themselves of the "other existing law clause" contained therein, to point to the possible application of Article 6674n-4 (subsequently renumbered as Article 3266b). The Court of Civil Appeals in its opinion alluded to the fact that we failed to request issues necessary for a recovery under Section 7 Article 3265, V.A.C.S. But, how do we request special issues on moving costs, costs of readapting the remainder, or for loss of profits when the trial court has either excluded all such evidence from the ears of the jury or instructed them as to its limited purpose? If such "other existing law clause" can be used, why does it not refer to the Constitution of the United States (28 U.S.C.A. Const. Amend.V) or to Article 3265 Section 3, V.A.C.S. wherein it speaks of injuries to the owner (Petition for Writ of Certiorari Page 6)?

COSTS OF READAPTING THE REMAINDER

Points of Error I and VI
(Germane to Assignment of Error 2, 3, 5, 13)

By way of reply to Respondents' argument that Petitioner, with regards to readapting costs, was "wanting his cake and wishing to eat it too," we would hasten to point out that much of the equipment which had been used by your Petitioner at the Almeda location before the condemnation could not be used on the remainder due to lack of space (Tr. p. 86, Ln. 19-23). It is clear that Pilgrim was specially damaged because much of the equipment which had been used before the condemnation was rendered valueless because it could not be installed in the remainder. New equipment had to be purchased by Pilgrim in order to attempt to continue its business on the remainder (Tr. 86, Ln. 2-7).

Even though both of said witnesses did testify as stated (Response to Petition for Writ of Certiorari, p. 21), nevertheless, that conclusion was reached by said witnesses after the Condemnee had moved said machinery and equipment, readapted the remainder, and operated its laundry and dry-cleaning plant thereon and found that such operations resulted in substantial loss of income to Petitioner (landowner).

It is also quite significant to point out that on the other hand, the witness for the condemnor, Atkinson, testified that both of said buildings did have a market value after the taking. So the matter as to whether or not said buildings did or did not have a market value after the taking was squarely before the jury and, therefore, the evidence as to the moving costs and costs of readapting

the remainder should have been allowed by the Trial Court to have been introduced to the jury.

Respectfully submitted,

LEWIS W. CUTRER
JAMES E. HAYS

By_____
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CERTIFICATE OF SERVICE

The undersigned, the Attorney of Record for Petitioner, does hereby certify that on this _____ day of November, 1972, he did deposit in the United States mail, with sufficient postage to deliver same, two (2) true and correct copies of this Reply Brief, addressed to Mr. Joe Resweber, County Attorney — Attention: Mr. Edward J. Landry, 202 Harris County Courthouse, Houston, Texas 77002, Attorney for Respondents.

_____
LEWIS W. CUTRER